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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 584.

THE UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL E. HALL AND JOHN W. MORSE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED SEPTEMBER 13, 1875.

Affirmed 5 to 4
Strong J
Wood

SUPREME COURT OF THE UNITED STATES.

No. 584.

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vs.

SAMUEL E. HALL AND JOHN W. MORSE.

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1, 2 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court-room, in the city of Des Moines, in the State of Iowa, and district aforesaid, on the second Monday of May, it being the tenth day of May, A. D. 1875, before the Hon. John F. Dillon, United States circuit judge, for the eighth circuit, and Hon. James M. Love, United States district judge for said district.

3 Be it remembered that, heretofore, to wit, on the 27th day of May, A. D. 1875, there was filed in the clerk's office of the circuit court of the United States for the district of Iowa, a writ of error, which said writ of error is in the words and figures following, to wit:

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable judges of the circuit court of the United States for the district of Iowa, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you,
5 or some of you, between The Union Pacific Railroad Company, plaintiff in error, and the United States ex rel. Hall & Morse, defts. in error, a manifest error hath happened, to the great damage of the said Union Pacific Railroad Company, as by complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause
6 further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Des Moines, on the 27th day of May, A. D. 1875.

(Signed) GEORGE B. CORKHILL,
Clerk U. S. C. C., Dist. of Iowa.

Allowed:

J. M. LOVE.

(Endorsed:) Filed for plffs. May 27, 1875. George B. Corkhill, clerk.

7 In obedience to the foregoing writ of error, I, George B. Corkhill, clerk of the circuit court of the United States for the district of Iowa, do hereby certify and return that hereto annexed is a full, true, and complete copy of the record and proceedings, and all things concerning the same, in a certain cause wherein the United States ex rel. Samuel E. Hall and John W. Morse are plaintiffs, and the Union Pacific Railroad Company, its officers and agents, are defendants, as full, true, and complete as the originals of the same are now on file and of record in my office.

I further certify and return that the original citation, with the return of service endorsed thereon, is hereto attached.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at my office, in Des Moines, in said district, this the 2nd day of July, A. D. 1875.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. C. C., Dist. Iowa.

8 UNITED STATES OF AMERICA,
District of Iowa, ss:

To the honorable the circuit court of the United States in and for said district:

You petitioners, Samuel E. Hall and John W. Morse, citizens of the United States, and of the State of Iowa, respectfully represent:

9 That the Union Pacific Railroad Company is a corporation, created and incorporated by an act of the Congress of the United States, approved July 1st, A. D. 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes."

That, by the 14th section of said act, the said company was "authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid," (being the one hundredth meridian of longitude west from Greenwich,) "from the point of commencement

10 on the western boundary of the State of Iowa, upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph first mentioned."

That by the first and eighth sections of said act it was provided and enacted that said company should construct a line of railroad and telegraph from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River & the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory, there to meet and connect with the line of the Central Pacific Railroad Company of California, which said line of railway and telegraph so provided for by said first and eighth sections are the lines referred to in said fourteenth section as the said railroad & telegraph first mentioned."

11 And your petitioners further represent that, in pursuance of said section fourteen of said act, the President of the United States did, on the 17th day of November, A. D. 1863, designate and fix the point on the western boundary of the State of Iowa, from which said railroad provided for, by said section fourteen, should be constructed by said company, by an official order of that date, of which the following is a copy, to wit:

"EXECUTIVE MANSION,
"*Washington, November 17th,* 1863.

"In pursuance of the fourteenth section of the act of Congress, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1st, 1862, I, Abraham Lincoln, President of the

12 United States, do hereby fix so much of the western boundary of

the State of Iowa as lies between the north and south boundaries of the United States township, within which the city of Omaha is situated, as the point from which the line of railroad and telegraph in that section mentioned shall be constructed.

"ABRAHAM LINCOLN."

And your petitioners further represent that the point on the western boundary of the State of Iawa, so designated by the President of the United States, from which said road should be constructed by said company, is within the corporate limits of the city of Council Bluffs, in said State, and on the eastern side of the Missouri River.

And your petitioners further represent that, by an act of Congress passed July 2, 1864, amendatory of said act of July 1st, 1862, incorporating said company, it was enacted, (section 9,) "That to
13 enable any one of the said corporations," (referring to the corporations previously mentioned in said act, (of which said Union Pacific Railroad Company was one,) "to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri River, and all other rivers for the convenience of said road, provided that any bridge or bridges it may construct over the Missouri River or any other navigable river on the line of said road shall be constructed with suitable and proper draws, for the passage of steamboats, and shall be built, kept, and maintained at the expense of said company in such
14 manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do."

And your petitioners further represent that, by a further act of Congress, passed February 24, 1871, it was enacted—

"That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds and secure the same by mortgage on the bridge and approaches and appurtenances as it may deem needful to construct and maintain the bridge over said river, and the tracks required to perfect the same as now authorized by act of Congress."

And it was in and by said act further provided—

15 "That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligations established by existing laws."

And your petitioners further represent that, by section fifteen of said amendatory act of July 2, 1864, it was enacted "that the several companies authorized to construct the aforesaid roads" (of which the said Union Pacific Railroad was one) "are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line.

And your petitioners further represent that, under and by virtue and in pursuance of said acts of Congress, the said Union Pacific
16 Railroad Company has constructed its bridge across the Missouri River, between the said cities of Omaha and Council Bluffs, and

has constructed its said railroad from said city of Council Bluffs over and across said bridge, and thence westward, as provided by said acts of Congress, so as to connect with the road of said Central Pacific Railroad Company at Ogden, in the Territory of Utah.

That the said roads constitute a great thoroughfare for the trade, travel, and transportation of the country of great public importance; that said Union Pacific Railroad connects at its eastern terminus at Council Bluffs with the Chicago & Northwestern, the Chicago, Rock Island & Pacific, and the Chicago, Burlington & Quincy, & Burlington & Missouri River Railroads, all duly incorporated under the laws of Iowa and Illinois, for the transportation of freight and passengers
17 between Chicago, Illinois, and Council Bluffs; and that said several lines of railroad constitute, in connection with other lines connecting with them at Chicago and said Union Pacific Railroad, direct and important lines of communication, travel, and transportation between the Atlantic and Pacific States, of great public value and necessity.

And your petitioners further represent that the said Union Pacific Railroad Company, in violation of the requirements of said acts of Congress, has hitherto wholly failed and refused, and still neglects and refuses, to operate its said road from its eastern terminus, at Council Bluffs, to its western terminus, at Ogden, aforesaid, for the purposes of communication, travel, and transportation, as one continuous line, in this, to wit:

That it has wholly failed and refused, and still fails and refuses,
18 to run its eastward and westward bound freight and passenger trains to and from its said eastern terminus, at Council Bluffs, but, on the contrary, has hitherto started its westward-bound trains of both descriptions from Omaha, Nebraska, on the west side of the Missouri River, and stopped its eastern-bound trains at the same place, treating said Omaha, to all intents and purposes, as the eastern terminus of its road, and still continues so to do.

That it has thereby wholly refused and failed to run its regular freight & passenger trains over that portion of its said road, between said Omaha and Council Bluffs, including that portion of its road constructed upon and across said bridge.

That, on the contrary, said company has hitherto run and operated said portion of its road (and still does so) as a distinct and independent line, under the name and style of "The Omaha Bridge Transfer,"
19 through one George W. Homans, junior, styling himself "contractor for operating the Omaha Bridge transfer."

That said portion of said road is operated by an independent time-schedule of its own, (a copy of which is hereto attached and made part hereof, marked "Exhibit A,") and also under a separate and independent freight-tariff, (a copy of which is also hereto annexed and made part hereof, marked "Exhibit B.")

That, in addition thereto, passengers are charged by said "Omaha Bridge Transfer" a separate and distinct fare of fifty cents each for transportation over that portion of said road between Omaha and Council Bluffs, and that both freight and passengers are transferred at Omaha, to or from the regular freight and passenger trains of said Union Pacific Company, which start from and stop at said Omaha, as aforesaid,
20 thereby causing great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to your petitioners, who are merchants, doing business

at said Council Bluffs, and who constantly are obliged to ship and receive goods transported over said road.

And your petitioners further represent that thereby the said Union Pacific Company has wholly failed and refused to make connections with the other said railroads constructed to the Missouri River, as required by said acts of Congress, and within the true intent and meaning of said acts.

Wherefore your petitioners pray that a writ of mandamus may issue from this honorable court, directed to the said Union Pacific Railroad Company, its officers and agents, strictly enjoining and com-
21 manding them henceforth to operate the whole of their said road from Council Bluffs, westward, and including that portion of their said road between Council Bluffs and Omaha, and constructed over and across the said bridge, as one continuo's line for all purposes of communication, travel, and transportation, and especially commanding them to start their regular through freight and passenger trains westward bound from said Council Bluffs, and to run their eastern-bound trains of both descriptions through and over said bridge to Council Bluffs, and to run and operate said trains to and from said Council Bluffs under one uniform time-schedule, and freight and passenger tariff, with the remainder of said road, & to wholly desist & refrain from operating said last-mentioned portion of said road as an independent and separate line and from causing or requiring freight or passengers bound westward
22 or eastward to be transferred as aforesaid at said Omaha; and otherwise commanding said defendants as to this court shall seem just & agreeable to law, & required by the circumstances of the case.

And your petitioners as in duty bound will ever pray, &c.

SAMUEL E. HALL,
JOHN W. MORSE, *Petitioners*,
By PUTNAM & ROGERS,
SAPP, LYMAN & HANNA, &
A. V. LARIMER, *Their Attys.*

UNITED STATES OF AMERICA,
District of Iowa, Pottawattamie County, ss:

Samuel E. Hall and John W. Morse, both of Council Bluffs, in said district, being duly sworn, say, and each for himself says, that they are petitioners in the foregoing petition, and have heard the same
23 read, and are acquainted with the contents thereof, and that the statements therein contained are true as they verily believe.

SAML. E. HALL.
J. W. MORSE.

Subscribed & sworn to by said Samuel E. Hall & John W. Morse, this 22nd day of September, A. D. 1873, before me.

[L. S.] W. C. JAMES,
Notary Public.

(Endorsed:) 1738. The United States ex rel. Samuel E. Hall & Jno. W. Morse vs. Officers and Agents of the Union Pacific R. R. Co. Pet'n for mandamus. Filed Sept. 23, 1873. George B. Corkville, clerk. Putnam & Rogers, Sapp, Lyman & H., A. V. Larimer.

George W. Homan, jr., contractor for operating the Omaha bridge transfer.

Time Schedule No. 14, to take effect Friday, May 9th, 1873, at 6 o'clock a. m.

For the government of employés only.
The management reserves the right to vary therefrom at pleasure.

25

PASSENGER-TRAINS.

West bound.			Names of stations.	East bound.		
No. 6*.	No. 4*.	No. 2.		No. 1*.	No. 3.	No. 5*.
		Arrive.		Leave.		
10.40 p. m.	5.50 p. m.	10 a. m.	9th & Marcy streets, Omaha.	5. a. m.	2.50 p. m.	9. p. m.
10.20 p. m.	5.30 p. m.	9.40 m. Leave.	Logan street, Council Bluffs.	5.20 a. m. Arrive.	3.10 p. m.	9.20 p. m.

*Sundays No'. 5 & 6 will be abandoned.
*Sundays Nos. *19, *20, *23, *24, *25, *26, *29, *30, *33, & *34 will be abandoned.
* " No. 1 will leave Omaha at 8 a. m.
* " No. 4 will leave Council Bluffs at 3.45 p. m.; arrive at Omaha 4.05 p. m.
No. 1 train connects with C. R. I. & P., C. & N. W., B. & M., K. C. St. Jo. & C. B. mail-trains.
No. 3 train connects with C., R. I. & P., C. & N. W., B. & M., K. C. & St. Jo., & C. B. express-trains.
No. 2 train connects with U. P. R. R. express-train.

STREET-CAR TRAINS.

West bound.									Names of stations.	East bound.								
36.	*34.	32.	*30.	28.	*26.	*24.	22.	*20.		*19.	21.	*23.	*25.	*27.	29.	31.	*33.	1.
Arrive. 7.15 p. m.	Arrive. 5.45 p. m.	Arrive. 3.45 p. m.	Arrive. 2.45 p. m.	Arrive. 12.45 a. m.	Arrive. 11.45 a. m.	Arrive. 10.45 a. m.	Arrive. 9.45 a. m.	Arrive. 8.45 a. m.	9th & Marcy streets, Omaha.	Leave. 8. a. m.	Leave. 9.00 a. m.	Leave. 10.00 a. m.	Leave. 11.00 a. m.	Leave. 12. m.	Leave. 2.00 p. m.	Leave. 3.00 p. m.	Leave. 5.00 p. m.	Leave. 6.30 p. m.
6.55 p. m. Leave.	5.25 p. m. Leave.	3.25 p. m. Leave.	2.25 p. m. Leave.	12.25 a. m. Leave.	11.25 a. m. Leave.	10.25 a. m. Leave.	9.25 a. m. Leave.	8.25 a. m. Leave.	Logan street, Council Bluffs.	8.20 a. m. Arrive.	9.20 a. m. Arrive.	10.20 a. m. Arrive.	11.20 a. m. Arrive.	12.20 p. m. Arrive.	2.20 p. m. Arrive.	3.20 p. m. Arrive.	5.20 p. m. Arrive.	6.50 p. m. Arrive.

FREIGHT-TRAINS.

West bound.					Names of stations.	East bound.					Freight-trains will not run on Sunday except by special order.
No. 18.	No. 16.	No. 14.	No. 12.	No. 10.		No. 9.	No. 11.	No. 13.	No. 15.	No. 17.	
Freight.	Freight.	Stock.	Freight.	Freight. Arrive.		Freight. Leave.	Freight.	Stock.	Freight.	Freight.	
6.30 p. m.	4.45 p. m.	2.50 p. m.	11.45 a. m.	8.40 a. m.	9th & Marcy sts., Omaha.	7. a. m.	10.03 a. m.	1. p. m.	3.50 p. m.	5.03 p. m.	
6.10 p. m.	4.25 p. m.	2.30 p. m.	11.25 a. m.	8.20 a. m.	Logan street, Council Bluffs.	7.20 a. m. Arrive.	10.23 a. m.	1.20 p. m.	4.10 p. m.	5.23 p. m.	

26 ☞ The trains will run on Omaha time, which is 33 minutes slower than Chicago time, and 20 minutes slower than Kansas City time.

P. P. SHELBY,
Superintendent.

H. H. COOK,
Train-Dispatcher.

Rules and regulations of Omaha Bridge Transfer.

1. Passenger-trains will have the right of way over all others, and can pass signal-posts at all times, excepting when the red is displayed, at which time they will come to a stop and not pass until signal is changed.

2. Conductors of passenger-trains will report to bridge train-dispatcher at least ten minutes before regular time of leaving at what
27 time they will be ready to leave, and receive his instructions before starting.

3. Trains will in no case back across the bridge, with engine behind, without first reporting to the superintendent and getting his permission.

4. Freight, construction, extra trains, engines bound east or west from Ninth-street depot, Omaha, will stop and receive their orders from there. Freight, construction, extra trains, and engines bound west from Logan-street station, Council Bluffs, will receive their orders from there before starting, but will not pass either the red or green signal.

5. All trains and engines bound west from Ninth-street depot, must receive their orders from bridge train-dispatcher before starting.

6. All trains or engines coming in on bridge-track from U. P.
28 R. R. junction will be governed by signals displayed at signal-post and will not stop there for orders unless the red signal is displayed.

7. Dirt-trains on the east side bound west, will pass signal-post at Logan-street station only when the white signal is displayed, and when the red or green is displayed will remain upon their side-track until the signal is changed to white, allowing them to proceed.

8. Dirt-trains on west side will pass signal-post at Ninth-street depot and at U. P. R. R. junction with bridge-track only when the white signal is displayed, and will not pass either the red or green signal until changed to white allowing them to proceed. This order will not be so construed as to mean that they have any privilege on main U. P. track, but will, as heretofore, receive their orders from the regular U. P. R. R. train-dispatcher.

29 9. Conductors of dirt and construction trains must not allow persons to ride on engine or train without an order from the superintendent.

10. The speed of trains and engines between Ninth-street depot on the west side and Logan-street station on the east side, must not exceed the rate of ten (10) miles per hour.

11. An engine or train must not follow another closer than 300 yards.

12. Engineers must at all times have their trains under perfect control, sound the whistle, if engine is ahead, as it passes each whistle-board. If the train is backing they will sound the whistle as front car passes each whistle-board, and ring the bell before starting.

13. Engineers will allow no person excepting road-masters and bridge foreman to ride on the engine without permission from the proper officer.

30 14. Enginemen are subject to the orders of conductor having charge of train, but at the same time are held equally responsible with the conductor in carrying out the prescribed rules which are necessary to secure safety.

15. Enginemen must see that their engines are provided with frogs and jack-screws, a large lantern for front of engine, two small white and one red lantern, red flags, and all tools necessary in case of accident They will also be particular to close the dampers of the ash-pans before crossing the bridge.

16. Train-men, engineers, and all having authority to use switches will be particular to leave them set for main track.

17. Trains and engines of all connecting roads, while occupying the bridge-tracks, will be governed by the time-card, and the rules on
31 the back of it.

18. The workingmen connected with the bridge must see that there are no obstructions upon the track when trains are approaching, and will be held strictly accountable for violation of this order.

19. Trackmen in all cases whether a train is due or not will, whenever it is necessary to take out a rail, or while repairing any portion of the roadway that will render the track impassable, put out a red flag in each direction at least 500 yards from the spot, in accordance with rule 25. Track foremen will examine their portion of the track at least once a day.

20. No train will, under any circumstances, leave a station before time specified in time-table and as regulated by the clock in the bridge
32 train-dispatcher's office, Omaha. Conductors and *and* enginemen will regulate their time-pieces by said clock daily.

21. Conductors of all trains will not leave either Omaha or Co cil Bluffs until fully satisfied that all trains due have arrived.

22. The bridge train-dispatcher at Omaha is authorized to run all trains or engines by telegraphic orders. No wild or extra train or engine will be run between stations without his knowledge and instructions.

SIGNALS.

23. When the red signal is displayed at signal-posts all trains must stop, and not pass until signal is changed to that allowing them to proceed.

24. When the green signal is displayed all trains excepting passenger-trains must stop, and not pass until signal is changed to white, allowing them to proceed.

33 25. The signal for throwing the switch at the junction of the U. P. R. R. with the bridge-track will be four short blasts of the whistle.

26. A stationary red flag by day, or red lantern by night, placed by the side of the track, denotes that the track is imperfect and must be run over with great care. A red flag by day or red lantern by night, waved upon the track or placed between the rails, signifies that the train must stop and not proceed until notice is given that it may do so with safety. The waving of a hat or any like action should be regarded as a signal of danger and not passed unnoticed.

27. A lamp swinging across the track signifies stop; a lamp raised up and down, go ahead; a lamp swinging over the head, to back up.

34 28. One blast of the whistle is to brake and stop; two blasts a signal to loose the brakes, and three blasts a signal to back.

P. P. SHELBY,
Superintendent.

35 *Freight tariff to take effect May* 23, 1872.

On and after date and until further notice, the rate on freight between Omaha and Council Bluffs will be five cents per one hundred pounds.

When shipped in car-load lots, $10 per car transfer will be charged on the following-named articles:

36 Agricultural implements, brick, bullion, cement, coal, ware emigrants' movables, fence-posts, furniture, grain, hay, hog product, ice, iron pig, iron R. R., iron scrap, lumber, lime, lath, machinery, ore, salt, sand, shingles, stock, stones, staves, hoop-poles, &c., vegetables, wood, wagons.

Similar freight not mentioned above will be classified as received from connecting lines.

P. P. SHELBY, *Supt.*

GEORGE W. HOMAN, JR.,
Contractor.

37 In the circuit court of the U. S. in and for the district of Iowa.

To the Union Pacific Railroad Company:

You are hereby notified that there is now on file in the office of the clerk of the said court the petition of Samuel E. Hall and John W. Morse, a copy of which said petition is hereto attached, asking that
38 a writ of mandamus issue as therein prayed, and that, on the first day of the October term, 1873, of said court to be held at Des Moines, on the 13th day of October, 1873, or as soon thereafter as counsel can be heard, a motion will be made for a peremptory writ of mandamus as in said petition is prayed, at which time you will appear and show cause, if any you have, why said motion should not be sustained and said peremptory writ granted as prayed, otherwise said petition will be taken as confessed, and a peremptory writ of mandamus will be issued requiring and compelling you to do and perform the matters and things complained of against you in said petition as is thereion prayed.

(S'g'd) PUTNAM & ROGERS,
SAPP, LYMAN, & HANNA, AND
A. V. LARIMER,
Attorneys for Petitioners.

39 UNITED STATES OF AMERICA,
District of Iowa, ss:

The within notice came into my hands on the 25 day of September, 1873, and on the 25th day of September, 1873, I served the same on the Union Pacific Railroad Company by reading said notice to N. T. Spoor, the general agent of said railroad company, and delivering to him a true copy thereof, and also delivering to him a copy of the petition herein.

All done at Council Bluffs, in the district aforesaid.

(S'g'd) E. W. JACKSON.

Sworn to before me by E. W. Jackson, and by him subscribed in my presence, this 25th day of September, 1873.

(S'g'd) J. LYMAN,
U. S. Commissioner, District of Iowa.

(Endorsed:) Hall & Morse vs. U. P. R. R. Co. Notice. Filed Oct. 17, '73. George B. Corkhill, clerk.

40 In U. S. circuit court, district of Iowa.—Oct. term, 1873.

HALL ET AL.
v.
UNION PACIFIC RAILROAD COMPANY.

A petition, under oath, is filed in this court by Samuel E. Hall and

John W. Morse, who describe themselves as citizens of the United States and State of Iowa, making the Union Pacific Railroad Company defendant or respondent.

It sets out the acts of Congress relating to the Union Pacific Railroad, and alleges that the eastern terminus of the road is within the corporate limits of the city of Council Bluffs, and State of Iowa, and on the eastern side of the Missouri River; that the said railroad company neglects and refuses to operate its road from the eastern terminus at Council Bluffs, by one continuous line, but, on the contrary, operates its road from Omaha, in Nebraska, although the railroad company has
41 constructed and owns a bridge across the Missouri River, between these two cities; that the company runs & operates the portion of its road over the bridge as a distinct and independent line, under the name of "The Omaha Bridge Transfer," "thereby causing great expense and delay to shippers and passengers and great damage and inconvenience to the public at large, and especially to your petitioners, who are merchants, doing business at Council Bluffs, and who constantly are obliged to ship and receive goods transported over said road." It is not essential to refer to the petition more at length. Its purpose sufficiently appears by the prayer, which is as follows:

Therefore your petitioners pray that a writ of mandamus may issue from this honorable court, directed to the said Union Pacific Railroad Company, its officers and agents, strictly enjoining and commanding them henceforth to operate the whole of their said road from Council Bluffs westward, and including that portion of their said road
42 between Council Bluffs and Omaha, and constructed over and across the said bridge, as one continuous line for all purposes of communication, travel, and transportation, and especially commanding them to start their regular freight and passenger trains, westward bound, from said Council Bluffs, and to run their eastern-bound trains of both descriptions through and over said bridge to Council Bluffs, and to run and operate said trains to and from said Council Bluffs under one uniform time-schedule and freight and passenger tariff with the remainder of said road, and to wholly desist and refrain from operating said last-mentioned portion of said road as an independent and seperate line, and from causing or requiring freights or passengers bound westward or eastward to be transferred as aforesaid, at said Omaha, and otherwise commanding said defendants as to the
43 court shall seem just and agreeable to law, and required by the circumstances of the case.

A notice directed to the defendant was served upon its general agent at Council Bluffs, stating that an application would be made to the court at this term for a peremptory writ of mandamus as prayed.

PUTNAM & ROGERS,
SAPP, LYMAN & HANNA, &
A. V. LARIMER,
For the Petitioners.

J. M. WOOLWORTH,
Amicus Curiæ.

DILLON, *Circuit Judge:*

By act of Congress approved March 3, 1873, (17 Stat'es at Large, 509,) it is provided that "the proper circuit court of the United States shall have jurisdiction to hear and determine all causes of mandamus to compel said Union Pacific Railroad Company to operate its road as required

by law." It is under this act that the present proceeding is insti-
44 tuted. There has been no appearance by the defendant in the court, but on the day fixed in the notice as the one on which the petitioners would apply for a writ of mandamus, counsel in the interest of the defendant have asked leave to suggest for the consideration of the court the question whether, assuming the proceeding to be regular, and one which is authorized, and the court to have jurisdiction of the defendant, the court can, prior to the final determination of the controversy, award a writ of mandamus. This suggestion is based upon the statute of the State (Code of 1873, p. 537) relating to "actions of mandamus," and the effect of claimed for the 5th section of the act of Congress of June 1, 1872, (16 Stat'es at Large, 197.) By the statute of the State, proceedings by mandamus are assimilated to regular actions at law, both in respect to pleadings and proceedure. The alternative writ is abolished, and an order of mandamus, which is a substitute for the peremptory writ, issues only after trial, and the right to such
45 order has been adjudged to the plaintiff.

The 5th section of the act of Congress of June 1, 1872, above mentioned, enacts that the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes in the courts of record in the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

The act of Congress first above mentioned gives to the proper circuit court, * * "jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law." It will be assumed that this is a proper court to take cognizance of the proceeding here commenced, and the ques-
46 tion which meets us, and wh ch must be determined before any further steps can be taken is, whether the proceedings shall be conducted in conformity to the State statutes relating to mandamus, or according to the practice at common law. If according to the latter, then in due course an alternative writ issues, which stands in the place of a petition or declaration, to which if served return must be made, and the rights of the parties be thereon determined in the usual manner; but if according to the State statute, then no writ can be awarded until the right to it is established by the final judgment of the court.

The question as to the effect of the act of June 1, 1872, upon the practice in mandamus proceedings in this court is one of some interest, and we proceed to consider it. Under the judiciary act, which prescribes the jurisdiction of this court, it is settled that it cannot issue the writ of mandamus at all in the exercise of original jurisdiction;
47 that the power to issue this writ is confined exclusively to cases where the jurisdiction already exists, and that jurisdiction cannot be acquired by means of this writ. (Bath County v. Amy, 13 Wall., 244; Riggs v. Johnson County, 6 Wall., 166, 197.)

Now, the 5th section of the act of June 1, 1872, regulating pleadings and proceedure, cannot have the effect to confer on this court jurisdiction in mandamus cases; the jurisdiction must otherwise exist by virtue of the judiciary act, or some other act of Congress, and then the court may issue the writ when necessary to the exercise of such jurisdiction, and agreeable to the principles and usages of law. (Judiciary act, section 14. Bath County v. Amy, supra.)

The provisions of the State statute which contemplate that there shall

be original process & regular pleadings and a final determination or judgment before the writ or order is awarded, are in the main wholly inapplicable to the ancillary jurisdiction of this court in mandamus
48 proceedings. So that in general the practice of this court in mandamus proceedings is not affected by the act of June 1, 1872, but remains as before. And by its terms that act refers to causes of a common-law nature, (sec. 11, judiciary act,) and by the express decision of the Supreme Court mandamus proceedings are not included in the section of the judiciary act which prescribes the jurisdiction of this court. (Bath County v. Amy, supra, and cases there cited.)

The general practice of the court in mandamus proceedings being regulated by the principles and usages of law and not by the State legislation, is there anything in the nature of this case which should make it an exception?

It is true that the act of 1873 gives the proper circuit court original jurisdiction of this particular case of mandamus, but as it is not one of the cases which falls within the jurisdiction of this court in common-law actions, as conferred by the judiciary act, and is not one of those to which the act of June 1, 1872, was intended to refer, and so
49 does not fall within it, and as the duty sought be enforced arises wholly under acts of Congress, and can be in no way influenced by State legislation, it is our opinion that this proceeding should be made to conform to the practice at common law, as liberalized and modified in more recent times by the legislation and judicial decisions.

A motion for a rule upon the Union Pacific Railroad Company to appear and show cause why an alternative writ should not be granted, or for an alternative writ to be granted without the rule, is the proper step next to be taken by the relators.

LOVE, *J.*, concurs.

(Endorsed:) Hall et al. v. Union P. R. R. Co. Court's opinion. Filed Oct. 21, 1873. George B. Corkhill, clerk.

50 1. The act of March 3, 1873, (17 Stats. at Large, 5, 9,) gives to the proper circuit court jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act.

2. Whether the circuit court for the district of Iowa can acquire jurisdiction over the company under this act, quere.

3. Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law may institute proceedings under the act of March 3, 1873, supra, without the sanction of the attorney-general.

4. Cases in which the attorney-general must, and in which private citizens may, apply for the writ considered.

A petition or statement under oath is filed in the court, by Samuel E. Hall and John W. Morse, citizens of the United States, and of the State of Iowa, asking for a writ of mandamus to be directed to the Union Pacific Railroad Company to compel it to operate its trains over the whole of its road as one continuous line, from Council Bluffs westward, and to desist from operating its bridge over the Missouri River between Council Bluffs and Omaha as an independent and separate line or portion of its road. The nature of the statements made by the prosecutors, and of their interests, and of the particular duty which it is sought hereby to compel the respondent to perform, appears more at large in

2 Dillon, C. C. R., 527. The decision then made settled the mode of procedure herein to be in accordance with the practice at common law, and the *the* counsel for the prosecutors or relators now move for an al, ternative writ of mandamus to be directed to the Union Pacific Railroad Company, commanding it to operate the whole of its line of road to and from Council Bluffs, etc., as above stated. A notice of the application was served upon a general agent of the company at Council Bluffs. No appearance is made by the company, but counsel in its interest have been heard to make suggestions against the granting of the alternative writ.

John N. Rogers, Sapp, Lyman & Hanna, and A. V. Larimer, for the prosecutors.

James M. Woolworth and A. J. Poppleton, contra.

DILLON, *Circuit Judge:*

On March 3, 1873, it was enacted by Congress that the "proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law." (17 Stats. at Large, 509.) This act is the basis of the present proceeding, and the proper practice under it has been already determined. (United States, ex rel. Hall et al. v. Union Pacific Railroad Co., 2 Dillon, C. C. R., 527.) The question before us at this time is whether an alternative writ shall be ordered.

The relator's counsel have been heard in support of the motion for the writ; and in a matter of so much importance we willingly granted the application of counsel to be heard in opposition, although they do not enter an appearance for the respondent.

Two leading objections have been urged against awarding the
51 writ. The one relates to the jurisdiction of the court over the company, the other to the form of the proceeding.

Whether the circuit court for the district of Iowa is the "proper circuit court" to hear and determine the case made by the relators need not, and perhaps cannot, now be determined. If the writ be awarded but cannot be served on the respondent so as to give the court jurisdiction over it, then, unless there is a voluntary appearance, the proceeding will necessarily fail. The petition or information sets out that the eastern terminus of the respondent's road is in this State, and we are not prepared now to say, as a matter of law arising from statutes of which we take judicial notice, that it appears that in no event can this court obtain jurisdiction under the act of 1873 over the company to compel it to operate its road as required by law. If it were admitted or appeared that no part of the road was in the district, and that the company had no principal place of business therein, we might have the data, perhaps, to decide whether in any event this court could acquire jurisdiction over it. Under the circumstances we reserve the question as to jurisdiction until we see whether the company appears, or until the character of the service of the writ upon it is known to us.

Whether the facts stated by the relator show a failure by the company to operate the road according to law, is a question which may arise on demurrer to the alternative writ, or on the return thereto in case the court shall acquire jurisdiction over the respondent, but which we do not consider at this stage of the proceeding.

This brings us to the objections which relate to the form of the proceeding. It is contended that the affidavits should be filed or the writ moved for by the public law-officer of the United States—either the

Attorney-General or the district attorney. In other words, as the duty here sought to be enforced is one which the company owes to the public at large, is one in which the relators have no special interest distinct from other citizens, it is maintained that the law-officers of the United States have the sole right to apply to the courts to enforce its performance, and that private persons can only have or move for the writ and mandamus when it is the appropriate remedy to enforce some individual or private right.

The affidavit or petition on which the writ is asked states that the failure of the company to operate its road according to law "causes great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large and especially to the petitioners, who are merchants doing business in Council Bluffs, and who are constantly obliged to ship and receive goods transported over said road." This is the only special interest set forth by the prosecutors; and it was conceded by their learned council that the duty here sought to be enforced was a public duty, or at least one in the performance of which the relators had no more interest than any citizen who had frequent occasion to ship and receive goods over the respondent's road.

There is no legislation of Congress specifically making it either the duty of the Attorney-General or the district attorney to institute proceedings like the present; and so the question whether they must be instituted by one of these officers or may be instituted by private persons, and the writ moved for private counsel, must be determined on general principles having reference, in their applications, to the particular nature of the defendant-corporation and the particular duty which it is here sought to make it discharge.

52 The act of March 3, 1873, gives to the proper circuit court jurisdiction in mandamus to compel the road to be operated according to law, but the act is silent as to who shall institute or set on foot the proceeding. This is the more significant, because, as respects other duties and supposed liabilities of the company, the Attorney-General is expressly directed to institute the necessary legal proceedings to protect the interests of the United States. (Act March 3, 1673, 17 Stat. at Large, 509; act *af* April 10, 1869, 16 ib., 56.)

There is, therefore, as respects the duty of operating its road as one continuous line, (which is the particular duty the performance of which is here sought to be compelled,) no declaration of the will of Congress as to who shall or may commence the necessary proceedings in mandamus.

It will conduce to a proper solution of question before us to advert briefly to the character of the Union Pacific Railroad Company. It was chartered by Congress and aided by money and lands. It is a private corporation in the sense that its capital stock is owned by the stockholders who are declared to constitute the corporate body. Both from the title of the incorporating statute and from express declaration in the body of act, (sec. 18,) it appears that the object of Congress in chartering and aiding the company, was to promote the public interest and welfare, and secure to the Government the use of the road for postal, military, and other purposes. The Government has also a lien on the railroad and its property to secure the bonds it issued to the company. By the act of July 2, 1864, (13 Stats. at Large, 356, sec. 15,) "the several companies are required to operate and use said roads and telegraph, for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line."

Throughout the legislation of Congress respecting this company, the

fact is recognized that it sustains a special or peculiar relation to the United States in their political capacity, and also a relation to the people at large or the general public.

Now, so far as the company owes duties to the General Government of a nature to be enforced by mandamus, it is clear that private persons cannot institute or set on foot the proceedings. This would be a duty devolved upon the Attorney-General by express enactment or resulting from his station. Such is not this case.

And it may be admitted that where, as in the present instance, the duty charged to be neglected by the company is one which concerns the public at large as distinguished from the Government, that the Attorney-General in his official capacity alone, or on the relation of private persons, might file the necessary suggestion or affidavits and move for the writ.

But where the duty said to be neglected is one which the company owes to the public, and where individuals who suffer from such neglect complain of it, must the court refuse the writ sole'y because the Attorney-General *poes* not move for it? Upon principle and authority this question must, in our opinion, be answered in the negative. By the practice at common law "the writ is ordinarily obtained on the motion of counsel to the court of King's bench, at Westmin*i*ster, during the term, supported by a suggestion, on the oath the of party injured, (prosecutor,) of his right, and of the denial of justice by the defendant, whereupon a rule nisi is made," etc. (Tapping, 5.) "The application to the court of B. R. for a rule for a writ of mandamus in all matter affecting the public is ex dibito justitiæ. * * "Where, however, the right or power is of a private nature, as in the case of many officers, etc., in which the public are not primarily concerned, it is discretionary in the court, in the first instance, either to grant or refuse the application." * * "In general, all those who are legally capable of bringing an action are
53 also equally capable of applying to the court of B. R. for the writ of mandamus," etc. (Tapping, 287, 288.)

It is clear that the affidavits upon which the writ is applied for may be made by any persons cognizant of the facts, and those affidavits should not be entitled as of the cause, for none is yet pending, and the Government only becomes a party *it* form when the writ issues. (Tapping, 413. Haight v. Turner, 2 Johns., 371; People v. Tioga C. P., 1 Wend., 291.)

So that the question is reduced to this, must the writ be applied for by the Attor'ey-General? and must it be refused in a case otherwise proper for it unless this officer makes or sanctions the application?

A thorough examination of the English books has satisfied us that it is the constant practice of the Queen's bench to entertain applications by private persons, on the motion of private counsel, for writs of mandamus to public officers and companies to enforce the performance of public duties. This is well illustrated by the case of Rex vs. The Severn & Wye R'y Co., 2 Barn. & Ald., 646, which in principle is analogous to the case at the bar. In the case just cited, upon the affidavit of a private prosecutor, (Taunton,) and on the motion of private counsel, without the presence or sanction of the attorney-general, the King's bench granted a mandamus to compel the railway company to re-instate and lay down again the track which it had taken up; and the writ thus applied for was ordered on the distinct ground that *that* the public, of which the prosecutor was one, and interested probably in the mines which the railway accommodated, had a right to the use of the road. See, also, Rex. vs. Comrs. of Dean Inclosure, 2 Maule & Sel., 80; Rex. vs. Bristol Dock Company, 6 Barn. & Cress., 181; Clarke vs. L. & N. Canal

Company, 6 Ad. & Ell. (N. S.) 898; Reg. vs. Falls, etc., 1 Ad. & Ell. (N. S.,) 636; Reg. vs. Trustees, etc., of Turnpike Road, 12 Ad. & Ell. (N. S.,) 448; Reg. vs. Archbishop of Canterbury, 11 Ad., & Ell. (N. S.) 578. And on principle, where a statute enjoins a duty for the benefit of the entire public, why may not any one of the public injured by its non-performance complain of it to the proper court, and ask it to compel the observance of the duty? Why should such person be compelled to resort to the Attorney-General, and what is the necessity or propriety for vesting in this officer, whose general duties, by reason of the peculiar structure of our Government, are quite dissimilar to those of the officer of the same name in England, the sole power to determine whether a judicial inquiry shall be made concerning the discharge by a corporation of duties imposed upon it by law for the public advantage? What answer is it to *be* present relators to-*day*, "Yes, you are required by the company's neglect to discharge its duty, but, as your injury is the same as suffered by others, the court cannot hear or redress your complaint." But it may be objected to this view that if one person may apply and have the writ, so equally all may apply, and the result is that the defendant may be vexed with many applications; whereas if the Attorney-General or some public officer can alone apply, one suit only of the same character will be brought, and the result will be conclusive, both as respects the public and the defendant. An answer to the objection is that the granting of a writ of mandamus is discretionary with the court, and if a case is pending which will test the right or question in controversy, the court may for this reason alone refuse to entertain similar applications by other persons.

54 Besides, it deserves consideration whether a judgment in a suit in which the Attorney-General appears concludes the public to any greater extent than a similar judgment would in a mandamus proceeding instituted by a private relator, as in each case it is the writ which makes the Government formally a party, and the form of the proceeding is the same.

There is some contrariety of opinion in this country whether private persons may be prosecutors or relators in a mandamus proceeding to enforce a public duty, but the decided weight of authority is in favor of the doctrine. The leading case asserting it is the People v. Collins, 19 Wend., 56, 1837, where the court, after an examination of the English decisions, and practice, reaches the conclusion that in a matter of public right any citizen of the State may, where mandamus is the proper remedy, be a relator or enforce the execution of the common law or an act of the legislature, though it was admitted to be otherwise in cases of private or corporate rights, where the title or right of the relator to relief must appear. (To the same effect, see, also, Hamilton v. State, 3 Ind., 452; Ottawa v. People, 48 Ill., 233; State v. County Judge, 7 Iowa, 186, 202; ib., 390, 397; People v. Halsey, 37 N. Y., 344; S. C. 53, Barb., 547; Slate v. Railway, 33 N. J. Law., 110; Watts v. Carroll Parish, 11 La. An., 141; Dillon Munic. Corp., sec., 695, and cases cited; Slate v. Turnpike Co., 16 Ohio St., 308. Contra: People v. University Regents, 4 Mich., 98; Sauger v. Commrs., 25 Maine, 291; Hoffner v. Comm., 28 Pa. St., 108; Compare Comm. v. Meeser, 44 Pa. St., 341.)

The right to institute mandamus proceedings by private prosecutors is likened by Judge Cowen to the right of private persons to become relators in informations in the nature of quo warranto. (People v. Collins, supra.) In substance there is often much resemblance, but in England an information proper, that is, the suggestion upon which the court acts, is filed by the attorney-general as the appropriate officer of the Crown,

and unlike the affidavits in mandamus the information cannot be made by private persons, though it may be and often is made upon their relation. While it is usual to join relators, it is not necessary. The object of joining them is that the defendant may not be oppressed without remedy, by vexatious suits, since the relators are liable to costs, while the Crown is not. (3 Bl. Com.) Per Lord Redessal, in Atty-Genl. v. Dublin, (1 Bligh N. R., 312.)

Reserving, as we do, all questions which concern the merits of the controversy, and in order, indeed, that the merits may be better understood, we think our discretion will be more wisely exercised by awarding than by refusing the alternative *writ*, particularly as in this way the opinion of the Supreme Court may more certainly be obtained than if the writ were denied.

Alternative writ ordered.

(Endorsed:) Filed May 21, 1874. George B. Corkhill, Clerk.

55 United States circuit court, district of Iowa, May term, 1874.
Thursday, May 21, 1874.

SAMUEL HALL ET AL., EX REL., *vs.* UNION PACIFIC R. R. CO. } No. 1738. Law.

This cause came on for hearing upon relator's *in for motion* and petition for a writ of mandamus herein against the respondents herein; and the court, being advised in the matter, ordered that an alternative writ of mandamus issue herein against said respondents as prayed, returnable to the next term of this court.

56 In the circuit court of the United States for the district of Iowa.

THE UNITED STATES, EX REL. SAMUEL E. Hall and John W. Morse, *vs.* UNION PACIFIC RAILROAD COMPANY.

57 And now comes the said Union Pacific Railroad Company, by its attorney, A. J. Poppleton, and makes a special appearance for the purpose of making this motion, and for no other purpose, and moves the court to quash the service of the writ herein and dismiss the suit, for the reason that the attempted service is illegal and void, and insufficient to give the court jurisdiction of the body of the defendant, as appears from the return thereof & the affidavit filed in support of this motion.

A. J. POPPLETON,
Atty. for Deft.

Indorsed:) 1738. U. S. cir. court, district of Iowa. United States, ex rel. Hall & Morse, vs. The Union Pacific Railroad. Motion to quash. Fi'ed Oct. 13, 1874. George B. Corkhill, clerk.

58 In the circuit court of the United States for the district of Iowa.

THE UNITED STATES, EX REL. SAMUEL E. Hall and John W. Morse, *v.* THE UNION PACIFIC RAILROAD COMPANY.

STATE AND DISTRICT OF IOWA, *ss:*

59 A. J. Poppleton, being duly sworn, says that for several years

last past he has been and now is the attorney of the Union Pacific Railroad Company, defendant in this action; that said corporation is created by and organized under a law of the United States; that, by a certain joint resolution of Congress, passed and approved April 10, 1869, the stockholders of said company were authorized to establish the general office at such place as they might select at a meeting to be held in the city of Boston April 22, 1869; that at such meeting said city of Boston was by said stockholders selected, and its general office established in said city, where it has ever since remained; that in said city, in the State of Massachusetts, all the meetings of its board of directors are held, and its books and records kept, and that all its officers are residents of said city except its president, who resides in the
60 State of New York; that it has no other office or place where its legislative corporate power is exercised; that its managing office, where the power and authority of its managing agents, to wit, superintendent, auditor, cashier, general freight and ticket agents, is exercised and wielded, is in the city of Omaha, and State of Nebraska, and it has no general managing office elsewhere; that the alleged service of the writ in this action was made on Sidney Dillon, president of said company, while casually travelling through the district of Iowa, he being at the same time a resident of the city and State of New York, and that defendant has and owns no railroad situated in the State of Iowa, except such portion of the iron track laid over and across its Missouri River bridge and the approaches thereto as are east of the boundary-line between the States of Iowa and Nebraska; that the said S.
61 H. H. Clarke, general superintendent, upon whom said alleged service was also made, resides and has his office at Omaha, Nebraska; and that neither the said Dillon, president, nor Clarke, superintendent, either reside or have an office in the State of Iowa.

(S'g'd) A. J. POPPLETON.

Subscribed & sworn to by A. J. Poppleton, before me, Oct. 13, '74.
GEORGE B. CORKHILL, *Clerk.*

(Endorsed:) 1738. U. S. cir. court, district of Iowa. United States, ex rel. Hall & Morse, vs. U. P. R. R. Compy. Aff't. in support of motion. Filed Oct. 13, 1874. George B. Corkhill, clerk.

62 This writ came into my hands on the 10th day of June, A. D. 1874, and on the same day I served the same on Sidney Dillon, president of the within-named defendant, The Union Pacific Railroad Company, at the transfer-grounds of said company, in the city of Council Bluffs, county of Pottawattamie, Iowa, by delivering to him a true copy
63 thereof, and offering to read to him the within writ, which he there and then waived, and on the same day I served the within writ on S. H. H. Clarke, general superintendent of the within-named defendant, The Union Pacific Railroad Company, by delivering to him a true copy thereof, and offering to read the original, which he then and there waived. All done at the transfer-grounds of said Union Pacific Railroad Company, in the city of Council Bluffs, Pottawattamie Co., Iowa.

(S'g'd) PETER MELENDY,
United States Marshal,
By JOHN T. STUART, *Deputy.*

Marshal's fees, 2 services, 2.00, 4.00; 150 miles, 6, 9.00; 2 copies, 39 folios, 3.90—13.90.

64 UNITED STATES OF AMERICA,
District of Iowa:

The President of the United States of America to the Union Pacific Railroad Company, its officers and agents.

Whereas it has been represented to our circuit court of the United States for the district of Iowa that Samuel E. Hall and John W.
65 Morse are citizens of the State of Iowa.

That the Union Pacific Railroad Company is a corporation created and incorporated by act of the Congress of the United States, approved July 1st, A. D. 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes."

That by the 14 section of said act the said company was "authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the line of said company at some point on the one hundre'th meridian of longitude aforesaid, (being the one hundre'th meridian of
66 longitude west from Greenwich,) from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph first mentioned."

That by the first and eig'th sections of said act it was provided and enacted that said company should construct a line of railroad and telegraph from a point on the one hundre'th meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory, there to meet and connect with the line of the Central Pacific Railroad Company of California, which said line of railway and
67 telegraph so provided for by said first and eig'th sections are the lines referred to in said fourteenth section as the "said railroad and telegraph first mentioned."

That in pursuance of said section fourteen of said act, the President of the United States did, on the seventeenth day of November, A. D. 1863, designate and fix the point on the western boundary of the State of Iowa from which said railroad provided for by said section fourteen should be constructed by said company, by an official order of that date, of which the following is a copy, to wit:

"EXECUTIVE MANSION,
"*In Washington, November* 17, 1863.

"In pursuance of the fourteenth section of the act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the
68 Government the use of the same for postal, military, and other purposes,' approved July 1st, 1862, I, Abraham Lincoln, President of the United States, do hereby fix so much of the western boundary of the State of Iowa as lies between the north and south boundaries of the United States township within which the city of Omaha is situated as the point for which the line of railroad and telegraph mentioned shall be constructed.

"ABRAHAM LINCOLN."

That the point on the western boundary of the State of Iowa, so designated by the President of the United States, from which said road should be constructed by said company, is within the corporate limits of the city of Council Bluffs, in said State, and on the eastern side of the Missouri River.

That by an act of Congress passed July 2, 1864, amendatory of said act of July 1st, 1862, incorporating said company, it was enacted
69 (section 9) "That to enable any one of the said corporation" (referring to the corporations previously mentioned in said act, of which the said Union Pacific Railroad Company was one) "to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River, and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri River, and all other rivers, for the convenience of said road: Provided, That any bridge or bridges it may construct over the Missouri River, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained at the expense of said company in such manner as not to impair the usefulness of
70 said rivers for navigation to any greater extent than such structures of the most approved character necessarily do."

That by a further act of Congress, passed Feby. 24, 1871, it was enacted, "That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks required to perfect the same, as now authorized by act of Congress."

And it was in and by said act further provided—

"That nothing in this act shall be so construed as to change
71 the eastern terminus of the Union Pacific Railroad from the place where it is now fixed, under existing laws, nor to release said Union Pacific Railroad Company or its successors from its obligations established by existing laws."

That by section fifteen of said amendatory act of July 2, 1864, it was enacted "That the several companies authorized to construct the aforesaid roads" (of which the said Union Pacific Railroad was one) "are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line."

That under and by virtue and in pursuance of said acts of Congress, the said Union Pacific Railroad Company has constructed its bridge across the Missouri River, between the said cities of Omaha and Council Bluffs, and has constructed its said railroad from said city
72 of Council Bluffs over and across said bridge, and thence westward as provided by said acts of Congress, so as to connect with the road of said Central Pacific Railroad Company at Ogden, in the Territory of Utah.

That the said roads constitute a great thoroughfare for the trade, travel, and transportation of the country, of great public importance.

That said Union Pacific Railroad connects at its eastern terminus, at Council Bluffs, with the Chicago and Northwestern, the Chicago, Rock Island & Pacific, and the Chicago, Burlington & Quincy, and Burlington

and Missouri River Railroads, all duly incorporated under the laws of Iowa and Illinois, for the transportation of freight and passengers between Chicago, Illinois, and Council Bluffs, and that several lines of railroad constitute, in connection with other lines connecting with them at Chicago and said Union Pacific Railroad, direct and important lines of communication, travel, and transportation between the Atlantic and Pacific States, of great public value and necessity.

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That the said Union Pacific Railroad Company, in violation of the requirements of said acts of Congress, has hitherto wholly failed and refused, and still neglects and refuses, to operate its said road from its eastern terminus at Council Bluffs to its western terminus at Ogden, aforesaid, for the purposes of communication, travel, and transportation, as one continuous line, in this, to wit, that it has wholly failed and refused, and still fails and refuses, to run its eastward and westward bound freight and passenger trains to or from its said eastern terminus at Council Bluffs, but, on the contrary, it has hitherto started its western-bound trains, of both descriptions, from Omaha, Nebraska, on the west side of the Missouri River, and stopped its eastward-bound trains at the same place, treating said Omaha to all intents and purposes as the eastern terminus of its road, and still continues so to do.

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That it has thereby wholly failed and refused to run its regular freight and passenger trains over that portion of its road between said Omaha and Council Bluffs, including that portion of its road constructed upon and across said bridge; that, on the contrary, said company has hitherto run and operated said portion of its road, and still does so, as a distinct and independent line, under the name of The Omaha Bridge Transfer, through one George W. Homans, junior, styling himself "contractor for operating the Omaha Bridge Transfer."

That said portion of said road is operated by an independent time-schedule of its own, and also under a separate and independent freight-tariff.

75

That, in addition thereto, passengers are charged by said Omaha Bridge Transfer a separate and distinct fare of fifty cents each for transportation over that portion of said road between Omaha and Council Bluffs, and that both freight and passengers are transferred at Omaha to and from the regular freight and passenger trains of said Union Pacific Company, which start from and stop at said Omaha as aforesaid, thereby causing great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to said Samuel E. Hall and John W. Morse, who are merchants, doing business at said Council Bluffs, and who constantly are obliged to ship and receive goods transported over said road.

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That thereby said Union Pacific Railroad Company has wholly failed and refused to make connections with the other said railroads constructed to the Missouri River, as required by said act of Congress, and within the true intent and meaning of said act.

Now, therefore, we, being willing that full and speedy justice should be done in the premises, do hereby command you, the said Union Pacific Railroad Company, its officers and agents, to operate the whole of your said railroad from Council Bluffs westward, and including that portion of your said road between Council Bluffs and Omaha and constructed over and across the said bridge, as one continuous line, for all purposes of communication, travel, and transportation, and especially to start your regular through freight and passenger trains westward bound

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from Council Bluffs, and to run your eastward-bound trains of both descriptions through and over said bridge, to Council Bluffs, and to run and operate your said trains to and from said Council Bluffs under one uniform time-schedule and freight and passenger tariff, with the remainder of your said road, and to wholly desist and refrain from operating said last-mentioned portion of said road as an independent and separate line, and from causing and requiring freight or passengers bound westward or eastward to be transferred as aforesaid at said Omaha, or that you appear before our said court at Des Moines, in said district, on or
78 before the second day of the next term of our said circuit court of the United States for the district of Iowa, to be held on the second Monday, the same being the 12th day of October, A. D. 1874, and show cause why you refuse to obey our said writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of our said circuit court of the United States for the district of Iowa, at Des Moines, in said district, on the 9th day of June, A. D. 1874, and of the 98' year of our Independence.

[L. S.] GEORGE B. CORKHILL,
Clerk United States Circuit Court,
District of Iowa.

(Endorsed:) In United States circuit court, dist. of Iowa. No. 1738. Law. The United States, ex rel. Saml. E. Hall and Jno. W. Morse, vs. Union Pacific R. R. Co., its Officers & Agent. Alternative writ of mandamus. Filed Oct. 3, 1874.

GEORGE B. CORKHILL, *Clerk.*

SAPP & LYMAN, JNO. N. ROGERS, A. V. LARIMER,
Attys. for Relator.

79 United States circuit court, district of Iowa, October term, 1874.
Tuesday, October 27, 1874.

SAMUEL HALL ET AL., EX REL.,
vs.
UNION PACIFIC R. R. CO. } No. 1738. Law.

This cause come on to be heard on the defendant's motion to quash the service of the alternative writ of mandamus, issued herein; relations appear by Jno. N. Rogers, and defendants by J. M. Woolworth and A. J. Poppleton, and the court, after argument of counsel thereon, being fully advised, orders that the said exceptions be, and the same are hereby, overruled, and the said defendants are ruled to file return to the said alternative writ of mandamus on or before two o'clock p. m. on Thursday next.

80 In the circuit court of the United States, eig'th judicial circuit, and district of Iowa.

THE UNITED STATES, EX REL. SAML. E. MORSE and John W. Hall,
vs.
THE UNION PACIFIC RAILROAD COMPANY.

81 To the honorable the judges of said court:

The Union Pacific Railroad Company, for return to the alter-

.native writ of mandamus heretofore issued by said court against it on the rela ion of Samuel E. Hall and John W. Morse, hereby make return to said writ and say:

That by act of Congress passed and approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and by the first and eig'th sections thereof, the Union Pacific Railroad Company was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph from a point on the one hundre'th meridian of longitude west from
82 Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, at a point to be fixed by the President of the United States, to the western boundary of Nevada Territory; that by the fourteenth section of the same act said company was authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundre'th meridian of longitude aforesaid, from the point of commencement on said western boundary of Iowa, which said road when completed constituted a branch of said main line of railroad from the one hundre'th meridian aforesaid to the western boundary of Nevada, commonly known as the Omaha branch.

That in addition to the order of the President of the United States of November 17, 1863, mentioned and set out at length in said
83 alternative writ, said President did, on the 7th day of March, 1864, make his further order, in the words and figures following, to wit:

"In pursuance of the provisions of section 14 of the act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1st, 1862, authorizing and directing the President of the United States to fix the point on the western boundary of the State of Iowa, from which the Union Pacific Railroad Company is by said section authorized and required to construct a single line of railroad and telegraph upon the most direct and practicable route, subject to
84 the approval of the President of the United States, so as to form a connection with the line of said company at some point on the one hundre'th meridian of longitude in said section named, I, Abraham Lincoln, President of the United States, do, upon the application of the said company, designate and establish such first above-named point on the western boundary of the State of Iowa, east of and opposite to the east line of section 10, in township 15 north, of range 13 east of the sixth principal meridian, in the Territory of Nebraska.

"Done at the city of Washington, this seventh day of March, in the year of our Lord one thousand eight hundred and sixty-four.

(Signed) "ABRAHAM LINCOLN."

That the said railroad company afterwards located and established the precise point from which said branch of said road should be built, on the eastern boundary of section 10, township 15 north, of
85 range 13 east of the 6th principal meridian, in the then Territory of Nebraska, and on the west bank of the Missouri River, and from

that point, so located and established, surveyed, fixed, and established its route westward to the eastern terminus of the main trunk of said railroad, on the one hundre'th meridian, and that a map of the said eastern terminus of the said branch of said railroad and of the route thereof westward so fixed and established as aforesaid, and as shown on the map hereto annexed marked "Exhibit A," was afterwards, on the 26th day of October, 1864, filed in the office of the Secretary of the Interior, and afterwards, on the 4th day of November, 1864, approved and adopted by the President of the United States, and that said branch of said railroad was afterwards built and completed, from said point
86 so fixed as aforesaid, and on said approved route westward, and after being examined by three commissioners appointed by the President to examine and make report to him upon the construction thereof, was by him accepted as built and completed in compliance with the requirements of the act authorizing the construction of said railroad and branches, to wit, the act of July 1, 1862, hereinbefore referred to, and the subsidy bonds of the United States, loaned in aid of the construction thereof under the provisions of sections five and fourteen of said act, were duly issued and delivered by the Secretary of the Treasury to said company on said branch as located and built upon the route hereinbefore mentioned, and that by the acts and proceedings hereinbefore recited the point from which said branch of said railroad re-
87 quired to be constructed to a junction with the main track thereof on the one hundre'th meridian of longitude was required to be built became fixed and established on the west bank of the Missouri River, on the east boundary of section 10, township 15, range 13 east of the 6th principal meridian, as shown on the map hereto attached and marked "Exhibit A," and has never since been changed either by the legislative or executive Department of the Government, and is situated in the State of Nebraska, and not in the city of Council Bluffs and State of Iowa, and that said branch was built and accepted by the United States in the year 1867, and has been ever since run and operated by said company.

That afterwards, to wit, in the year 1869, said railroad company commenced the erection, and under the provisions of the ninth sec-
88 tion of the act of Congress of July 2, 1864, recited and set out in the alternative writ, and the act of Congress approved February 24, 1871, in the words following, to wit:

"Be it enacted by the Senate and House of Representatives of the United States, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so con-
89 structed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of an act entitled 'An act to authorize the construction of certain bridges and to establish them as post-roads,' approved July twenty-fifth, eighteen hundred and sixty-six, so far as the same is applicable thereto: And provided, That nothing in this act shall be so construed as to change the eastern terminus of the

Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release the said Union Pacific Railroad Company or its successors from its obligation as established by existing laws: Provided also, That Congress shall at all times have power to regulate
90 said bridge and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: Provided, That if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw,"—completed in the year 1872 a railroad-bridge over the Missouri River, at a point about two miles south of the point so established as aforesaid as the eastern terminus of the Omaha branch of said railroad.

That under the powers granted by said act of Congress of February 24, 1871, and for the purpose of raising money to erect said Missouri River bridge, said company, on the first day of April, 1871, exe-
91 cuted a certain mortgage or indenture of trust to John Edgar Thompson, John Pierpont Morgan, and Elisha Atkins, as trustees for the holders of the bonds hereinbefore mentioned, upon its said Missouri River bridge and approaches, whereby it mortgaged the said bridge and approaches, a copy of which is hereto attached, marked "Exhibit B," and the buildings and structures connected therewith, at Council Bluffs or Omaha, to secure the payment of certain special bridge-bonds, for the total sum of two millions and a half of dollars, United States gold coin, or five hundred thousand pounds British sterling money, in two thousand five hundred bonds for the sum of one thousand dollars, United States gold coin, or two hundred pounds British sterling money, on the first day of April, 1896, and the interest thereon at eight per cent. per annum, in half-yearly installments, and among other things provided that the said trustees or their successors,
92 if the said company should fail to provide the moneys required to meet matured interest, sinking-fund payments, and other obligations arising under the terms and conditions of said mortgage, so long as any of said bonds shall be outstanding or unpaid, shall have the right to fix the tolls to be levied upon all property and passengers to be transported over said bridge and approaches, and that the rates so fixed might be changed from time to time, by the trustees, so as to produce a sufficient revenue to maintain said bridge and approaches in good repair, pay the interest on said bonds, and provide in each year a sinking-fund, to consist of the fixed sum of $42,000 United States gold coin, and of a sum equal to the interest upon all bonds previously purchased or redeemed by the operation of the sinking-fund, in previous years.

"That tolls should be levied and collected by the company
93 upon all property and passengers transported over or using the said bridge, depots, or lines, and should constitute a first transportation lien upon all such property, and should be first deducted and retained from the gross sums received from transportation of such property and passengers, and should be especially set apart and the amount thereof received, deducted, and retained in each calender month, and should within fourteen days after the end of each calendar month be paid to the credit of the trustees for the time being at such banking-house in New York as they should from time to time designate, and said money should be kept by said trustees at current deposit interest for the benefit of the company, and out of the moneys so raised and paid and the interest that might accrue thereon, the trustees for the time

being should, in each year, deduct and retain such sums as
94 should be necessary to pay and provide the interest for the current year on said bonds, and the said further sum of forty-two thousand dollars gold coin, and a sum equal to the interest upon the bonds previously redeemed or purchased under the provisions hereinafter contained.

"If the company should fail to levy and collect the tolls to be fixed as aforesaid upon the property and passengers transported over, or having the use or benefit of, the said bridge, depots, or lines, or to deposit and apply the said tolls in manner hereinbefore provided, or if the tolls collected and paid over by the company should prove insufficient to meet the payments aforesaid to be made thereout by the trustees for the time being for interest and redemption of the bonds at the time and manner hereinbefore provided, and the company should fail in due time to pay the deficiency to such trustees, or if the company
95 should fail to keep any other of its covenants herein contained, then and in such case it should be lawful for the trustees for the time being, and it was made their duty, to enter into the direct possession and receipt of the said tolls, and for that purpose to appoint suitable agencies for collection of the said tolls independently of the company, and thereout to defray the expenses attending the maintenance, working, and managing of the said bridge and lines, and out of the surplus, so far as it would extend, to pay the interest and provide the sinking-fund upon the said bonds, and generally to apply such surplus in the same manner as was provided in the case of tolls levied by the company and paid over to the trustees for the time being."

That said company caused the same to be negotiated, and out
96 of the proceeds of the sale of the bonds thereby secured the said bridge and approaches were built and completed, and that no subsidy of lands or bonds has been allowed said company therefor.

That said railroad corporation, being advised and believing that said Missouri River bridge did not constitute a part of the branch of its railroad which it was authorized to build from the Missouri River to a junction with the main line at the 100th meridian; that it was not bound by law to operate or run trains of its own over said bridge, but rather to permit and allow the trains and cars of other railroad companies to cross and use said bridge, paying therefor such tolls as might lawfully be fixed, and because the railroads extending from the Missouri River easterly, and seeking the business of, and a connection
97 with, the Union Pacific Railroad, refused to allow their trains and cars to run over said bridge, for the purpose of preventing the delay and interruption of the transportation of freight and passengers which would result from the said refusal of said railroad companies, said Union Pacific Railroad Company has, since the completion of said bridge, run over and upon said bridge a so-called transfer train for the carriage of passengers, and for the purpose of keeping a separate and distinct account of the earnings and expenses of said bridge by the tolls charged for transportation over the same, and, complying witht he conditions of said mortgage and the duties and obligations of the respondent thereunder, have run both freight and passenger trains over said bridge under a separate and distinct organization of its employees, known as the "Omaha Bridge Transfer," but it does not now, and has not for
98 more than a year last past, so operated said bridge through one George W. Homan, jr., styling himself contractor for operating the "Omaha Bridge Transfer," or through any other contractor or person or corporation, and that it has charged and collected for the car-

riage of passengers and freight over and across said bridge no greater or higher tolls than is authorized and allowed by said act of Congress of Feb'y 24, 1874; that its transfer trains have been run in close connection between the railroads terminating on the east and those terminating on the west bank of the Missouri River.

And respondent further saith that it is advised and believes that no part of the railroad which it was required and empowered to build and operate under the acts of Congress of July 1st, 1862, and July 2,
99 1864, extended east of the west bank of the Missouri River, and that the railroad-bridge and approaches which it was authorized to build over the Missouri River, and a portion of which extends into the State of Iowa, is no part of its said railroad, and that it is not bound by law to run its trains over the same; that all its repair and manufacturing shops, round-houses, and appliances for repairing and outfitting its trains, cars, and locomotives, have been built and are situated in Omaha, on the west bank of the Missouri River, and are, with the machinery therein, of great value; that respondent has now in course of erection and nearly completed at Omaha large and commodious depots, suitable and ample for the accommodation of its business, and the transfer and delivery thereof to connecting roads, and
100 that it is inconvenient, disadvantageous, and contrary to the interest of respondent to run its regular passenger and freight trains over and across said bridge, as required by said alternative writ.

Respondent further says that, if compelled to operate said Missouri River bridge without tolls for the use of the same, it will be deprived of the means of complying with the provisions of said bridge-mortgage, and providing the principle of said bonds, and the interest thereon as it falls due for the holders thereof, and thereby the value of said securities will be greatly depreciated, if not altogether destroyed; and respondent submits whether such requirement can be lawfully or rightfully made without bringing the said trustees and the said bondholders before the court to be heard in that behalf.

And respondent further says it is not true that both freight and
101 passengers are transferred at Omaha to and from the regular passenger-trains of said company; that most of both the east and west-bound through freight is transferred at either Omaha or Council Bluffs, but not all of it; cars loaded with machinery, agricultural implements, and freight difficult to handle not being unloaded at either place, but the freight transferred from one car to another is so transferred in about equal proportions at Council Bluffs and Omaha, according to the convenience of respondent, and in such quantities and ways as to expedite as far as possible the carriage of such freight, and that no delay or damage to shippers arises therefrom other than is necessarily incident to transfer of freight between connecting lines of railroad; that in the case of freight shipped from Council Bluffs westward, cars loaded at that point are hauled
102 across the bridge with as little delay as possible, and thence without discrimination or delay placed in the proper train; if through freight, placed in a through train; if destined to local stations, in a way train, and transported to its destination with all possible despatch; and that this method of transacting the freight business is the most convenient and economical for the company and most advantageous to the shipper.

Wherefore respondent prays the judgment of the court whether it is lawfully bound to comply with the demand of the said alternative writ,

that the court will make such order in the premises as shall be required by right and justice, and that the respondent be hence dismissed.

(S'gd) THE UNION PACIFIC RAILROAD COMPANY.
By A. J. POPPLETON,
Its Attorney.

(Here follows map, marked page 103.)

104 EXHIBIT B.—*Bridge-mortgage.*

This indenture, made this day of , 1871, by and between the Union Pacific Railroad Company, (hereinafter called the company,) of the one part, and John Edgar Thompson, of Philadelphia, John Pierpont Morgan, of New York, and Elisha Atkins, of Boston, of the other part.

105 Whereas by an act of Congress of the United States approved 22nd of February, 1871, the company is authorized to construct a bridge and railroad-line across the river Missouri, between Omaha, in the State of Nebraska, and Council Bluffs, in the State of Iowa, and to issue such bonds, not exceeding two millions and a half of dollars, as it might deem needful for that purpose, and to secure the same by mortgage on the bridge and its approaches and appurtenances;

Mortgage authorized by act of Feb'y 22, 1871

And whereas the company, for the purpose of purchasing and acquiring the lands and materials necessary for the construction of the said bridge and its approaches, and connecting lines, and for construct-

106 ing the same, has determined to obtain a loan of money by the issue of special bridge-bonds, for the total sum of two millions and a half of dollars, United States gold coin, or five hundred thousand pounds British sterling money, in two thousand five hundred bonds, numbered 1 to 2500, inclusive, for the sum of one thousand dollars, United States gold coin, or two hundred pounds British sterling money each, the principal of which is payable on the first day of April, 1896, unless sooner redeemed under the sinking-fund clause hereinafter contained, payable, at the option of the holder, at the office of Messrs. Dabney, Morgan & Co., or their satisfactory successors, of New York, or at the London and San Francisco Bank, (limited,)

Amount, denomination, and character of bonds &c.

107 London, with interest in the mean time from the first day of April, 1871, on the said principal sum at the rate of eight per cent. per annum, payable by half-yearly installments of forty dollars United States gold coin, or of eight pounds five shillings and nine pence British sterling money, each, on the first day of October and the first day of April in each year, free of all taxes on said bonds in the United States, the said interest to be payable at the option of the holder, in United States gold coin, at the office of Messrs. Dabney, Morgan & Co., or their satisfactory successors, New York, or British sterling money, at the office of the said London and San Francisco Bank, limited, in London, upon presentation of the coupons attached to the bonds, with provisions for the principal of the said bonds, becoming due immediately upon default of paying the interest thereon, or upon default in the provision of the fund for payment of interest and sinking-fund as hereinafter provided;

108 And whereas it has been agreed, upon the issue of the said bonds, that the payment of the principal and interest thereof shall be secured in manner hereinafter expressed, and that the covenants and mortgage hereinafter contained should, for that purpose, be made

Trustees named.

to the said John Edgar Thompson, John Pierpont Morgan, and Elisha Atkins, (hereinafter called the trustees,) for the benefit of and in trust for the various persons who have consented or shall hereafter consent to purchase and take the said bonds, and all other the persons who shall at any time hereafter be or become holders of the said bonds, and also, so far as necessary, for the benefit of and in trust for any persons or corporation who shall become purchasers of the said bridge, under the powers hereinafter contained;

109 And whereas the said bonds are indentified as being entitled to the benefit of the security hereby given by a certificate upon each of them signed by the trustees:

Now, this indenture witnesseth, that the company doth hereby covenant and agree with and to the trustees in manner following; that is to say:

ART. 1. The survivor or survivor' of the trustees, or other persons or person, who shall, under the powers hereinafter contained, be for the time being the trustees or trustee of these presents, (all which persons collectively are hereinafter called the trustees,) *for the time being*, if the

Trustees, in case of default of company, to have right to fix tolls, &c.

the said company should at any time fail to provide the said trustees with all the moneys required to meet matured interest, sinking-fund payments, and all other obligations

110 arising under the terms and conditions of this indenture shall, so long as any of the said bonds shall be outstanding or unpaid, have the right to fix the tolls, to be levied upon all property and passengers to be transported over, or which shall use or have the benefit of the said bridge or the depots connected therewith at Council Bluffs or Omaha, or the lines of tracks required to connect the said bridge with the railways having their terminus at Omaha and Council Bluffs, and the rates so fixed may be changed from time to time by the trustees, for the time being, so as to produce from time to time a sufficient revenue to maintain the said bridge and lines in good order and repair, and to pay the interest on the said bonds, and to provide in each year a sinking fund, to consist of the fixed sum of forty-two thousand dollars, United States gold coin, and of a sum equal to the interest upon

111 all bonds previously purchased or redeemed by the operation of the sinking fund in previous years, which sinking fund in each year is to be applied for the purchase or redemption of so many of the said bonds as it will purchase under the provisions hereinafter contained, provided the holders elect to sell the same.

ART. 2. The said tolls shall be levied and collected by the company

Tolls to be a first lien upon mortgaged property, &c.

upon all property and passengers transported over or using the said bridge, depots, or lines, and shall constitute a first-transportation lien upon all such property, and shall be first deducted and retained from the gross sums received from transportation of such property and passengers, and shall be especially set apart, and the amount thereof received, deducted, and re-

112 tained in each calendar month, and shall, within fourteen days after the end of each calendar month, be paid to the credit of the trustees, for the time being, at such banking-house at New York as they shall, from time to time, designate; and said money shall be kept by said trustees at current deposit interest for the benefit of the company; and out of the monies so raised and paid and the interest that may accrue thereon, the trustees, for the time being, shall, in each year, deduct and retain such sums as shall be necessary to pay and provide

Money received from tolls, &c., to be applied, &c

the interest for the current year on the said bonds, and the said further sum of forty-two thousand dollars gold coin, and a sum equal to the interest upon the bonds pre-

viously redeemed or purchased under the provisions hereinafter contained; and the two last-mentioned items shall constitute the
113 said sinking fund, which is to be applied in each year by annual drawing for the purchase and redemption of the said bonds thus drawn, with a premium of ten per cent. thereon, if the holders thereof elect to sell the same in the manner hereinafter provided; and out of the said moneys so received by them, the trustees, for the time being, shall pay the interest on the unredeemed bonds; and the principal and premium of the bonds thus to be redeemed or purchased, if any, and the remainder (if any) of the tolls received by the said trustees in each year shall be paid by them to the company.

ART. 3. The bonds to be redeemed in each year shall be drawn by lot by the trustees for the time being, or some or one of them, or by some person duly authorized by them, in the month of November in each year, beginning in the month of November, 1871,
114 at the office of Dabney, Morgan & Co., or their satisfactory successors, New York, in the presence of one of the members of that firm, and of a notary public, and notice of the numbers so drawn shall be posted by the trustees for the time being at the offices where coupons are paid in New York and London, and shall be also advertised by them in one or more newspapers in each of the cities of London and New York, on or before the first day of February, after the drawing, and on the first day of April following the drawing, the bonds so drawn shall be paid by the trustees for the time being to such of the holders thereof as may have in writing notified the trustees on or before that day of their election, to have their said bonds so redeemed or paid, together with a premium of ten per cent. on the nominal value thereof, that is to say,
115 at the rate of two hundred and twenty pounds British sterling money, or one thousand one hundred dollars United States gold coin, for each bond, such payment to be made at the option of the holders of the bonds, at the offices of the London and San Francisco Bank, (limited,) in London, or Messrs. Dabney, Morgan & Co., or their satisfactory successors, of New York, on delivery up of the bonds, with the unmatured coupons, and in case any of the holders of the bonds thus drawn shall fail to notify the trustees in writing as aforesaid of their election to have their said bonds thus paid and redeemed with the premium aforesaid, then and forever thereafter such bonds shall cease to be entitled to be purchased and redeemed by means of said sinking fund as aforesaid, and said sinking fund shall be proportionately reduced. In case the tolls paid over by the company to the trustees for the time being shall not
116 be sufficient to enable the said trustees to make the payments which they are hereinbefore authorized to make, the company will from time to time pay to the trustees, for the time being, such sums of money as shall be required to make up the deficiency as and when required to make the payments.

Trustees to redeem bonds by lot, &c.

Payments to be made when and how.

If tolls not sufficient, company to make up deficiency.

ART. 4. All moneys to be raised by the issue of the said bonds shall, in the first instance, be received by the trustees, who shall retain in their hands from time to time such amount as shall in their judgement be sufficient to secure the entire construction and completion of the said bridge and of the connecting lines and approaches thereof, and the payment and provision of the interest and sinking fund upon the said bonds during such construction.

All money raised by bonds to be paid to trustees, &c.

117 ART. 5. For the better securing the payment of the principal and interest of the said bonds, and in consideration of the premises, and of one dollar, lawful money of the United

Bridge reconveyed to trustees, &c.

States, to the company in hand paid by the trustees, the receipt whereof is hereby acknowledged, the company hath granted, bargained, sold, assigned, transferred, set over, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, assign, transfer, set over, enfeoff, convey, and confirm unto the said John Edgar Thompson, John Pierpont Morgan, and Elisha Atkins, trustees as aforesaid, and to their heirs and successors, and the survivors and survivor of them, and the heirs of such survivor, all and singular the said bridge over the river Missouri, between Omaha and Council Bluffs, and the approaches thereof, and the appurtenances belonging thereto, including all
118 parts and portions of the said bridge now constructed or hereafter to be constructed, and the depots at Council Bluffs and Omaha aforesaid, and the lines and tracks required to perfect the said bridge, its approaches and appurtenances, and to connect the same with the neighboring lines, including in this conveyance as well the lines and tracks now constructed as those which may hereafter be constructed, and also all estates, terms, and rights of way for the said bridge approaches and appurtenances, as well now held by the company as to be hereafter acquired by it, and all the rights and privileges of the company of, in, or to the said bridge approaches or appurtenances, or touching, concerning, or appertaining to the maintenance, use, and occupation thereof. To have and to hold all the said premises unto the said John Edgar Thompson, John Pierpont Morgan, and Elisha
119 Atkins, as such trustees as aforesaid, and to their heirs and successors, and the survivor and survivors of them, and to the heirs of such survivor, upon trust, to hold the same to and for the uses and purposes, and upon and with the conditions and powers in and by these presents expressed and declared.

Company to insure buildings, depots, &c.

ART. 6. So long as the surity hereby created shall subsist, the company will insure the depots and buildings connected with the said bridge to the full value thereof, with some insurance office or offices to be approved by the trustees, for the time being, against loss or damage by fire, and will deposit with such trustees the policies of insurance and produce to them receipts for payment of premiums so soon as they shall become due; in default whereof the
120 trustees for the time being may insure the said depots and buildings, and the company will forthwith repay them the cost thereof, or the said trustees may retain the same out of any moneys which shall come to their hands by virtue of these presents.

On default of co. trustees to receive tolls directly.

ART. 7. If the company shall fail to levy and collect the tolls to be fixed as aforesaid upon the property and passengers transported over, or having the benefit or use of the said bridge, depots, or lines, or to deposit and apply the said tolls, in manner hereinbefore provided, or if the tolls collected and paid over by the company shall prove insufficient to meet the payments aforesaid to be made thereout by the trustees for the time being for interest and redemption of the bonds, at the time and manner hereinbefore
121 provided, and the company shall fail in due time to pay the deficiency to such trustees, or if the company shall fail to keep any other of its covenants herein contained, then, and in such case, it shall be lawful for the trustees, for the time being, and it is hereby made their duty, to enter into the direct possession and receipt of the said tolls; and for that purpose to appoint suitable agencies for collection of the said tolls, independently of the company, and thereout to defray the expenses attending the maintenance, working, and managing of the said bridge and lines, and out of the surplus, so far as it will extend, to

pay the interest and provide the sinking-fund upon the said bonds, and generally to apply such surplus, in the same manner as is hereby provided in the case of tolls having been levied by the company and paid over to the trustees for the time being.

122 ART. 8. If any such default shall be committed by the company as in the preceeding article mentioned, the trustees, for the time being, shall be authorized, and are hereby required, upon the request of the holders of one-tenth of such part of the said bonds as shall then be unpaid, with or without entry as they may deem best, to cause the said bridge and lines, and all other the property, matters, and things hereinbefore expressed, to be conveyed, to be sold by public auction in the city of New York, giving ninety days' notice of the time, place, and terms of sale, once in each week, in one or more papers published in London or New York, and upon such sale to execute to the purchaser or purchasers deeds, releases, tranfers, and conveyance of the property, estates, rights, and securities thus sold, and to apply the proceeds of such sale, together with all monies in their hands, which shall be received under or by virtue of these presents, after deducting all expenses incurred in the execution of the trusts or powers hereby created, pro rata in payment of the principal and interest of the said bonds then unpaid, whether the same shall have become due or not, and shall pay over the surplus, if any, to the company.

Continued default. Trustees may sell mortgaged property.

Purchaser not required to inquire as to notice.

ART. 9. No purchaser on any such sale shall be bound to inquire whether such notices as are mentioned in the preceeding article have been given, or be affected by any notice that they have not been given; but the conveyance of the trustees to the purchaser shall, notwithstanding the want of such notices, be an effectual discharge to the purchaser (who shall not be bound to see to the application of the purchase-moneys) and an effectual conveyance to him.

124 ART. 10. If such sale shall be made as is provided in article 8, the company shall thereafter in perpetuity be bound to pass over the said bridge and lines, and no part thereof over any bridge or ferry across the Missouri now or hereafter existing within twenty miles in a straight line above or below the said bridge hereinbefore mentioned, all the passengers and freight of the company passing across the Missouri, and will pay, as a first transportation lien upon such traffic, such tolls as shall from time to time be lawfully charged by the purchasers of the said bridge and lines in respect of goods and passengers passing over or using the same.

In case of sale co. bound to use bridge, &c.

ART. 11. Notwithstanding any such sale, the company shall remain bound to pay to all the bondholders so much of

125 the principal and interest of their bonds, if any, as shall not have been paid out of the proceeds of such sale.

If proceeds of sale are not sufficient to pay bonds co. to pay balance.

ART. 12. Upon payment by the company, without any such sale as is mentioned in article 8, and of the principal and interest of the said bonds, at the times and in the manner aforesaid, the transfer, conveyance, and assignment hereby made of the said bridge, with its appurtenances, and other the premises hereinbefore expressed to be conveyed, shall be void, and all the estate, right, and property hereby conveyed to the trustees shall revert to and revest in the company without any acknowledgement of satisfaction or reconveyance, re-entry, or any act whatever.

Payment by company of all bonds, &c., to revest right to bridge, &c.

126 ART. 13. If any of the trustees for the time being shall die or resign, the vacancy shall be filled by a successor from among the persons holding bonds of the said issue to an

Vacancy in trustees how to be filled.

amount not less than five thousand dollars, such appointment to be made in writing by the remaining trustee or trustees, for the time being, and the board of directors of the company, or in case the said board of directors shall fail, after notice in writing from said trustees, to make such joint appointment within three calender months after the vacancy shall occur, the appointment shall be made by any court of equity having jurisdiction in the premises, and upon any such appointment all necessary conveyances and assurances shall be made to vest in the new trustees, jointly with the remaining trustees, the property hereby mortgaged, and all the rights and powers hereby created.

127 ART. 14. Notwithstanding any such vacancy, the remaining trustee or trustees may discharge all the duties and powers hereby given to the trustees for the time being, as effectually as if the full number of trustees had been filled up; and all the covenants herein contained are to be deemed and made with the trustees hereby appointed, or the survivor or survivors of them, and their successors in the said trust.

Remaining trustees to have full power, &c.

ART. 15. The said trustees hereby appointed severally accept the said trust, but they are not nor are the trustees for the time being to be answerable except for wilful default or gross negligence in the execution of the said trust, and neither of the trustees for the time being is to be answerable for the doings and 128 omissions of any other of such trustees unless consented to by him.

Trustees not liable for acts of each other.

ART. 16. The company will pay to the trustees for the time being a reasonable compensation for the discharge of their duties, and also all or any expenditure or costs incurred therein, or the trustees for the time being may retain the same out of any monies which shall come to their hands, by virtue of these presents.

Compensation of trustees.

In witness whereof the company hath affixed its common seal to these presents, and caused the same to be signed by its president and secretary, in pursuance of a resolution of its board of directors, and the other parties have hereunto set their hands and seals the day and year first above written.

Executed in the presence of—

Dated April 1, 1871.

Rec. book K, p. 579.

129 (Endorsed:) U. S. circuit court district of Iowa. The United States ex rel. Hall & Morse vs. The U. P. R. R. Co. Return to alternative writ. Filed October 29, 1874, at 10.05 o'c., a. m. George B. Corkhill, clerk.

EXHIBIT C.—*First mortgage.*

[U. S. revenue-stamp, $16.00, cancelled.]

This indenture made this first day of November, 1865, between the Union Pacific Railroad Company, a body corporate, created by and under an act of the Congress of the United States of America, approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, 130 and to secure to the Government the use of the same for postal, military, and other purposes," party of the first part, and *and* Edwin D. Morgan, of the city of New York, and Oakes Ames, of Easton, in the State of Massachusetts, parties of the second part.

Edwin D. Morgan, and Oakes Ames, trustees.

Witnesseth:

Whereas the said party of the first part is authorized by the said act of Congress incorporating the same, and by the several acts of Congress amendatory thereof, namely, the act approved July 2, 1864, being chapter 216, and the act approved March 3, 1865, being chapter 88, to borrow money for the objects and purposes therein mentioned, and to execute a mortgage to secure the payment thereof, as hereinafter contained, which bonds and mortgage, by said act of Congress, are made the first lien, and unto it the lien of the Government bonds is subordinate.

Authority to execute mortgage and issue bonds given by act of July 2, 1864.

131 And whereas for such objects and purposes said party of the first part is desirous of borrowing a sum of money which shall be equal to the amount per mile of United States bonds, provided by said acts to be issued to said company, for each and every mile of its said railroad completed and to be hereafter completed, and of securing the payment of its corporate bonds, to be issued and negotiated therefor, by a mortgage to said parties of the second part, as trustees, as hereinafter provided and set forth.

And whereas, under and pursuant to lawful authority conferred by said several acts of Congress, all of which are hereby declared to be taken as a part of this instrument, the said party of the first part has determined to make, execute, issue, negotiate, and deliver, under its "corporate seal," its corporate bonds, from time to time, and severally, payable to bearer, for the sum of $1,000 each, thirty years after the date thereof, with semi-annual interest at the rate of six per centum per annum, from the date thereof, to an amount equal and not exceeding per mile the amount provided to be issued by the Government of the United States, to aid in the construction of said railroad; each of said bonds so to be issued to bear date of the time of its issue, and to be in form and be certified and have coupons annexed as follows:

Certain acts of Congress relative to U. P. R. R. made part of this instrument.

Terms, denomination, and interest of bonds.

132

UNITED STATES OF AMERICA:

First-mortgage bonds.

The Union Pacific Railroad Company acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars, which sum the said company promises to pay unto the holder hereof, at its office in the city of New York, thirty years after the date hereof, and also interest thereon at the rate of six per centum per annum, payable semi-annually from the date hereof, in lawful money of the United States, until the principal sum be paid, on presentation of the annexed interest-coupons at the office of the company in the city of New York.

Bonds, when and where paid.

133

In testimony whereof the said company has hereunto caused to be fixed its corporate seal, and these presents to be executed y its president and treasurer, at the city of New York, this day of , A. D. one thousand eight hundred and .

, *Presid nt.*

, *Treasurer.*

We the undersigned trustees, do hereby certify that the above bond is issued by virtue of authority granted to the Union Pacific Railroad Company by the acts of Congress of the

134

Certificates of trustees. United States, approved July 2, 1864, chap. 216, and March 3, 1865, chap. 88, and is of similar tenor, except as to the date, and of like amount with the other bonds issued and to be issued under the said acts of Congress; that the said company has executed to us a mortgage, dated November 1, 1865, purporting to convey to us the entire railroad and telegraph line of said company, with its equipment and appurtenances, for the benefit of the holders of said bonds, and to secure the payment thereof; that the said mortgage has been recorded in every county through or in which the said road has been permanently located, and a certified copy thereof filed in the office of the Secretary of the Interior at Washington, and that the same
135 is a first lien upon the line of the said company's road, and that no more such bonds have been certified by us than are authorized by the said acts of Congress.

, *Trustees.*

COUPON.

Coupon. The Union Pacific Railroad Company will pay bearer, at its office in the city of New York, thirty dollars, on the day of , being interest due that day on its bond No. .

, *Treasurer*

Date of mortgage, and how executed. And whereas said party of the first part has further determined under and pursuant to authority so conferred by acts of Congress as aforesaid, to execute and acknowledge, under its corporate seal, and deliver to said parties hereto of the second part, a mortgage conveying, assigning, and transferring to them in
136 trust all the corporate, real, and personal property, franchises, and effects hereinafter specifically described as security for the payment of the said bonds so to be issued, and the interest to grow due thereon, and that said mortgage should contain all and singular the covenants and conditions hereinafter set forth, and should bear date the first day of November, 1865.

Now, therefore, this indenture witnesseth, that the Union Pacific Railroad Company, party of the first part, under and pursuant to and by virtue of the express authority of said several acts of Congress as aforesaid, and for and in consideration of the premises, and for the purpose and with the intent of better and more effectually securing the payments of said bonds, to be issued as aforesaid, with the interest
137 due and to grow due thereon, and for and in consideration of one dollar lawful money of the United States of America, by the said parties of the second part hereto fully and truly paid to the said party of the first part, the receipt whereof is hereby acknowledged, hath bargained, sold, assigned, transferred, and set over, enfeoffed, conveyed, and confirmed unto the said Edward D. Morgan and Oakes Ames, the said parties of the second part, as trustees, and in trust and to the survivor of them, and to their successor or successors, all and singular the railroad and telegraph of the said party of the first part heretofore constructed or hereafter to be constructed from a point on the western boundary of the State of Iowa, heretofore fixed by the President of the United States, pursuant to the terms and provisions of said acts of Congress, to wit, at the city of Omaha, in the Territory of Nebraska,
138 thence, as provided in said acts of Congress, through the Territories of the United States to the western boundary of the late

Territory of Nevada, together with all its lands, tenements, hereditaments, rights of way, and easements acquired or appropriated, or which shall be hereafter acquired or appropriated, for the purpose of a right of way for a single, double, or other track railroad and telegraph line, and for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, superstructures, erections, and fixtures being necessary for the use of said railroad or telegraph; and also all and singular the franchises now owned, possessed, or acquired, or which shall be hereafter owned, possesed, or acquired by the said party of the first part, for the purpose of building and operating said railroad and telegraph
139 above specified and described; and also all the rails, depots, yards, engine-houses, car-houses, station-houses, warehouses, machine-shops, work-shops, and fixtures of said party of the first part; and also all goods and chattels now owned or which shall hereafter be owned or acquired by said party of the first part necessary to said railroad and telegraph line, or the running and operating the same, and also all goods and chattels now owned or which shall hereafter be owned or acquired by said party of the first part, necessary to said railroad and telegraph line, or the running and operating the same.

Property, &c., covered by mortgage held in trust for bondholders subject to conditions while no default is made.

To have and to hold all and singular the premises, rights, franchises, lands, and property, real and personal, hereinbefore and hereby assigned, mortgaged, pledged, and conveyed, or intended to be, and every part and parcel thereof, with all the appurtenances unto the same belonging or in anywise
140 appertaining, unto the said Edwin D. Morgan and Oakes Ames, parties of the second part, and their survivor, successor or successors, and his or their assigns, in trust for the person or persons, firm or firms, bodies politic or corporate, who have heretofore or who shall hereafter at any time become the purchasers or holders, or owners of any or either of said bonds so to be issued as aforesaid, and subject to the terms, provisions, and conditions in said bonds contained, and subject also to the provisions and conditions of the said acts of Congress; and also subject to the possession and management of said railroad and telegraph line and property by said party of the first part and its assigns, so long as no default shall be made in the payment of either the interest or principal of the said bonds, so to be issued, or any of them, and so long as said party of the first
141 part shall well and truly observe, keep, and perform all and singular the covenants, agreements, conditions, and stipulations in this indenture contained and set forth, and which are to be observed, kept and performed, by and on the part of the said party of the first part.

What property, &c., is covered by the mortgage.

And the said Union Pacific Railroad Company, the party of the first part, covenants and agrees to and with the said parties of the second part that it shall and will pay or cause to be paid, all taxes, charges, rates, levies, and assessments imposed, assessed, or levied, or *or* which may hereafter be imposed, assessed, or levied upon the premises, lands, franchises, and property hereby mortgaged, conveyed, and assigned, or intended so to be, and shall and will, at its own proper cost, charge, and expense, do, or cause to be done, all the acts and things necessary
142 or proper to be done or performed in order to preserve and keep valid and in tact the lien or incumbrance upon all and singular the aforesaid lands and premises, property and franchises, hereby created; and further that the said party of the first part shall and will not at any time hereafter, or in any way or manner, interfere or avail itself of any extension laws, appraisement laws, or any other laws of the

States or Territories through which the said road shall pass, now in force or hereafter to be enacted and in force in said States or Territories, which would alter, affect, or impair, or which are or which may be designed, intended, or construed to alter, affect, or change the rights and interests of the said parties of the second part as herein declared, or which shall in any way impede or obstruct the mode or manner of realizing, perfecting, or enforcing the rights and interests of any of
143 the owners or holders of said bonds, so to be issued as aforesaid or which shall affect, change, or alter the time, place, mode, means or manner of perfecting, enjoying, or enforcing any of such rights or interests as the same are herein declared; and also that the said party of the first part shall and will at any time or times hereafter and from time to time execute, acknowledge, and deliver under its corporate seal to the said parties of the second part, and the survivor, successor or successor thereof, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures, and instruments in writing, and shall and will do and perform all such other or further acts or things as shall or may be necessary or proper, or as their counsel, learned in the law, shall deem necessary, proper, or expedient for the better or more effectually securing upon the above-mortgaged premises the payment
144 of the said bonds so to be issued, and the interest due and to grow due thereon in manner aforesaid, or for carrying into effect the true intent, design, objects, and purposes of these presents, or making, preserving, continuing and keeping valid and effectual the lien and incumbrance created or intended to be created by the execution, delivery, and recording of this indenture upon the property, real and personal, railing-stock, equipments, franchises, and effects hereinbefore particularly described.

Company covenants.

This indenture further witnesseth that the said Union Pacific Railroad Company, the party of the first part, by these presents, further covenants and agrees to and with the said parties of the second part hereto, and the survivor or survivors of them and their or his successor or successors as trustees, in manner and form following, that is to say:

To pay at time and in manner specified.

145 First. That the said Union Pacific Railroad Company, the party hereto of the first part, shall and will well and truly pay the said sums of money secured in and by said bonds so to be issued as herein provided, together with the semi-annual interest to become due thereon, at the rate of six per centum per annum, at the times, in the manner, and at the place specified therein respectively.

That no bonds shall issue contrary to the acts of Congress.

Second. That no greater amount of bonds shall be issued or put in circulation, under the provisions of this deed, than the sum or amount authorized to be issued by the act of Congress aforesaid, nor shall any such bonds be issued before the same lawfully may be issueable in pursuance of said acts.

Third. If any default shall be made in the payment of any of said bonds or coupons at the time and place and when the same shall
146 become payable, and such default shall continue for six months thereafter, then the said trustees, on the request in writing of holders of a majority of such bonds, then in force and so in default, may and shall forthwith enter into and take possession of all and singular the said mortgaged property, rights and franchises, and use, operate, and manage the same for the benefit of the holders of all said bonds, and if such default shall continue for the space of one year from the time of the happening of such default, then said trustees, upon the request in writing of the holders

That trustees in case of default may take possession of mortgaged property, &c., sell the same and apply proceeds in payment of bonds, &c.

of a majority of all said bonds then outstanding, may and shall offer for sale, and sell, all and singular the said mortgaged property, rights, and franchises, or so much thereof as may be necessary at public auction, first giving notice of such sale by advertisement in one or more
147 newspapers published in the city of New York for a period of ninety days, and otherwise proceeding according to the statutes in such case made and provided, and as the attorneys of the said party of the first part for that purpose by these presents duly authorized, constituted, and appointed, may and shall make and deliver to the purchaser or purchasers on said sale, a good and sufficient deed or deeds of conveyance, in the law, of the lands and real property so sold in fee-simple, and of all other property, rights, franchises, and privileges so sold, by such full, perfect, and effectual title and estate as the nature of the things sold shall admit and allow; and all proceeds of said mortgaged property, rights, and franchises, which shall be realized by the management or operation thereof or the sale thereof, provided for in this third clause, after deducting all necessary and proper costs, expenses, charges,
148 and commissions of said sale, and all the other expenses and disbursements of the said trustees in their proceedings, shall be applied by said trustees to the payment of the moneys then owing for principal and interest upon such of said bonds as shall then remain in force, whether due or to become due and without preference, and the surplus, if any, shall be paid by them to the said party of the first part, its successors or assigns.

Am'nts in default paid trustees to relinquish property, &c.

And in case of the said trustees entering and taking possession as aforesaid, then, at any time afterwards, but before such sale as aforesaid, upon the payment and satisfaction of all sums then payable on said bonds for interest, and all costs, expenses, and charges incurred or accrued by reason of such entry, possession, and use, and the operating and using of the property by
149 the said trustees, they, the said trustees, shall relinquish and restore the premises to the said party of the first part, to be held subject to these presents, in like manner as if such entry had not been made.

Power of trustees in possession.

And whensoever the said trustees shall be in possession by means of any such entry they shall have full power to run and operate said railroad and to do and carry on the business of the corporation, party of the first part, including repairs, for the benefit of the holders of said bonds, under the trusts by these presents declared, in such manner as the said trustees shall deem discreet and advisable.

Trustees paid; how & by whom.

And for all services rendered by the said trustees in performance of any duty whatsoever under and by virtue of these presents, they shall be entitled to receive from the parties of the
150 first part, or from and out of the said property or its proceeds, a fair and proper compensation.

Mortgage to cease on payment of all bonds, &c.

This indenture further witnesseth that these presents are upon the express condition that, upon the payment of all the bonds so issued and to be issued, in full, and the interest due thereon, then these presents, and the estate hereby granted, shall cease and determine; and the said party of the first part, its successors and assigns, shall thereupon be immediately and fully re-invested, with said premises, franchises, and property hereby granted in law and in fact, without any entry or other act whatsoever.

It is further agreed that no one of the said trustees, their survivor or

Trustees not to be answerable for each other, &c.

successor, shall be answerable for the acts, omissions, or defaults of the other, nor for anything short of gross
151 negligence or wilfull default in the discharge of his duties.

And this indenture further witnesseth that this trust, and the security hereby intended, extends only to such bonds of the party of the first part as shall be certified by the said trustees or the survivor of them, and his and their successor or successors; and when all such bonds shall be satisfied and discharged the trusts herein and hereby created shall cease.

Trust extends only to bonds certified by trustees.

Vacancies in trustees, how to be filled.

This indenture further witnesseth, and it is hereby expressly agreed, that in case of the death, resignation, incapacity, or removal of any or either of the parties of the second part, then it shall and may be lawful, and the remaining, acting, surviving, or competent trustee and the party of the first part are hereby
152 jointly empowered to elect and appoint, by an instrument in writing, duly executed by each of such parties, a competent person to fill the vacancy created in manner aforesaid; and that such person so appointed trustee, on his acceptance of such appointment, shall have and possess and be vested with the same rights and powers as trustee as he would have had and possessed or been vested with had he been originally made a party of the second part hereto, and shall perform the same duties in all respects and until such appointment shall be so made in manner aforesaid, and notwithstanding any vacancy as aforesaid, said remaining, surviving, acting, or competent trustee shall have full power and authority to execute each and all the trusts hereby created; and his acts in the premises shall be as legal, valid, and effectual in all respects and to all intents and purposes as if the same had
153 been done and performed by both the parties hereto of the second part.

On failure to fill vacancy, secretary of company to call meeting of bondholders.

And if, for any reason, the surviving trustee and the party of the first part hereto should fail to *write* in the appointment of a trustee, as before required, within the space of thirty days after such vacancy occurs, then and in that case it shall be the duty of the secretary of the company to call a meeting of the bondholders by printed notice published in two of the public newspapers of the city of New York, calling such meeting of the bondholders, to be held in said city, not less than thirty days after the first publication of said notice, for the purpose of filling such vacancy.

Power of bondholders of such meeting.

At the time and place specified in such notice the holders of said bonds, at such meeting, shall proceed to elect a suit-
154 able person to act as such trustee to fill said vacancy; and a majority in interest of said bondholders so attending said meeting or legally represented thereat, shall be competent to elect a new trustee, and the person so elected shall immediately, on such election and on his acceptance in writing of such trust, become vested with all the estate, trusts, rights, powers, and duties of the trustee in whose place he shall have been elected.

Company to execute such instruments, &c., as to enable trustees to act, &c.

And in case said appointment shall be made in manner aforesaid, or in case of such election as aforesaid, the party of the first part hereby covenants to make, execute, and deliver such other or further instruments, deeds, indentures, or assurances as may be necessary to enable the person or persons so appointed or elected to execute the trusts hereby created and declared as fully and perfectly in all respects as he or they could have executed
155 the same if originally made a party or parties of the second part to this indenture.

Notice to Department of the Interior.

Notice of the appointment or election of every new trustee shall be given to the Department of the Interior.

Further duties of trustees.

It is further agreed that it shall be the duty of the said trustees to certify as aforesaid, and deliver immediately to the said party of the first part all such bonds as by the said acts of Congress may lawfully be issued from time to time as the same shall become issueable, to be held or used by the said party of the first part.

In witness whereof the said Union Pacific Railroad Company, the party of the first part, has caused these presents to be subscribed
156 by its president and attested by its secretary, and has caused its corporate seal to be hereunto affixed, and the said parties of the second part, for the purpose of signifying their acceptance of the trusts herein and hereby created, have hereunto subscribed their names and affixed their seals the day and year first above written.

JOHN A. DIX, [L. S.]
President Union P. R. R. Co.
E. D. MORGAN. [L. S.]
OAKES AMES. [L. S.]

Attest: CHAS. TUTTLE,
Secretary U. P. R. R. Co.

Subscribed, sealed, and delivered in the presence of—
(By E. D. Morgan.)
Witness: CHAS. TRACY.
JOHN I. DAVENPORT.
(By Oakes Ames.)
Witness: CHAS. TRACY.
AMASA COBB.
(By J. A. Dix & C. Tuttle.)
Witness: CHAS. TRACY.
CHARLES NETTLETON.

157 DISTRICT OF COLUMBIA,
Washington County, ss:

I, John F. Callan, a commissioner for the Territory of Nebraska, residing in Washington, in the county of Washington, and District of Columbia, do certify that, on the 13th day of December, in the year 1865, at Washington, in the District aforesaid, before me personally appeared Charles Tracy, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he was one of the subscribing witnesses to the execution of the foregoing deed; that he knew Edwin D. Morgan and Oakes Ames, the persons described in and who executed the said deed; that he saw said Morgan and the said Ames sign, seal, and deliver the same, and they acknowledged to him that they executed the same, and that he,
158 the said Charles Tracy, thereupon became the subscribing witness to the execution of the said deed, which is to me satisfactory evidence of the due execution of said deed.

In witness whereof I have hereunto set my hand and official seal, at Washington, in the county of Washington, in the District of Columbia, this 13th day of December, in the year 1865.

[L. S.] JOHN F. CALLAN,
A Commissioner for Nebraska.

[U. S. revenue-stamp, 5 cents, cancelled.]

STATE OF NEW YORK,
City and County of New York:

Be it remembered that, on this 15th day of December, A. D. one thousand eight hundred and sixty-five, before me, Charles Nettleton, a com-
159 missioner of the Territory of Nebraska in and for the State of New York, duly appointed and commissioned by the governor of said Territory, duly sworn, and dwelling in said city of New York, personally appeared Jno. A. Dix, the president of the Union Pacific Railroad Company, and Charles Tuttle, the secretary of the same company, to me respectively known, who, being by me severally duly sworn, did depose and say that he, the said Jno. A. Dix, resided in the city and county and State of New York, and that he, said Charles Tuttle, resided in Rye, in the county of Westchester, in the State of New York; that he, said Jno. A. Dix, was the president, and he, said Charles Tuttle, was the secretary of said Union Pacific Railroad Company; that they each knew the corporate * * * * * * *

160 [To be attached to the return as a part thereof, by order of the court.]

And this respondent further saith that, on the first day of November, 1865, under the authority of the 10th section of the said act of Congress, of July 2, 1864, respondent, for the purpose of raising the money
161 to build and complete its railroad, executed a mortgage or deed of trust of its railroad franchises and property, as therein described, to Edwin D. Morgan and Oakes Ames, as trustees for the holders of the bonds, thereby secured, a copy of which is hereto attached, marked "Exhibit A C," and made a part of this return, and that bonds secured thereby to the amount of twenty-seven millions of dollars have been issued and sold and are now outstanding in the hands of holders, and out of the proceeds of the sale of said bonds, so secured as aforesaid, the respondent's road was, in great part, built.

(Endorsed:) 1738. U. S. ex rel. Hall et al. vs. Officers etc., U. P. R. Co. Amendment to return alt. writ. Filed Oct. 31, 1874. George B. Corkhill, clerk.

162 Circuit court of the United States, district of Iowa.

THE UNITED STATES, ON THE RELATION OF Samuel E. Hall & al.,
vs.
THE UNION PACIFIC RAILROAD CO. } Oct. term, 1874.

Now come the said relators, Samuel E. Hall and John W. Morse
163 by their attorneys, Putnam & Rogers and Sapp & Lyman, and for answer to the return of said defendant to the alternative writ of mandamus herein, say:

That, on the 9th day of March, A. D. 1864, the President of the United States transmitted to the Senate of the United States *as* an official message, together with a copy of the said order made by him & set forth in said return, dated March 7th, 1864, which message is in the words following, to wit:

"To the Senate of the United States:

"In compliance with a resolution of the Senate of the 1st instant, respecting the points of commencement of the Union Pacific Railroad on the one hundredth degree of west longitude, and of the branch road

from the western boundary of Iowa to the said one hundredth
164 degree of longitude, I transmit the accompanying report from the Secretary of the Interior, containing the information called for.

"I deem it proper to add that, on the 17th day of November last, an executive order was made upon this subject and delivered to the Vice President of the Union Pacific Railroad Company, which fixed the point on the western boundary of the State of Iowa, from which the company should construct their branch-road to the one hundredth degree of west longitude, and declared it to be within the limits of the township, in Iowa, opposite the town of Omaha, in Nebraska. Since then the company has represented to me that, upon actual surveys made, it has determined upon the precise point of departure of their said branch road from the Missouri River, and located the same as described in
165 the accompanying report of the Secretary of the Interior, which point is within the limits designated in the order of November last, and inasmuch as that order is not of record in any of the Executive Departments, and the company having desired a more definite one, I have made the order, of which a copy is herewith, and caused the same to be filed in the Department of the Interior.

"ABRAHAM LINCOLN.

"EXECUTIVE MANSION, *March* 9, 1864."

By which the true intent & meaning of said orders of November 17th, 1863, and March 7, 1864, are already made to appear.

And these relators expressly deny that, by virtue of the acts and proceedings in said return set forth, or any of them, the point from which said branch of said railroad was required to be built became fixed
166 and established on the west bank of the Missouri River at the point shown and marked on the said map, to said return annexed, as the "initial point," as in said return alleged.

And for further answer to said return, these relators aver that although the said railroad company did lay down a track from the said pretended "initial point," on the west bank of the Missouri River, and about two miles above the said bridge, and did obtain from the United States its subsidy-bonds, for the said two miles of track, or thereabouts, running from said initial point southward, as being part of its said road as in the said acts of Congress provided, yet that the said company never in fact used & operated the said two miles, or thereabouts, of track from
167 said initial point as a part of its road, and never in fact established or used the said pretended initial as or for its terminus, or run the trains to or from the same. That, on the contrary, after the said company had obtained and received from the United States its subsidy-bonds, on said two miles of track so laid from said initial, and long before the construction of its said bridge, said company took up and removed said track, and has never in fact, since said removal, had or operated any track or railroad whatever running to said initial point or near the same. That the actual main station or terminus of said road on the western side of the Missouri River to and from which its trains are run, is situated in the city of Omaha, about two miles south of said pretended initial point, and in close proximity of the western end of said bridge.

168 That said company has no other depot or station except near its machine-shops, which are located about a mile above said bridge and on its original track, from which freight and emigrant trains are run.

That a track of said company branching from the original track, about

one-half mile west of the bridge, runs continuo'sly and directly to said depot or station, and thence over the said bridge into Council Bluffs, on the Iowa side of said river. And these relators aver that said company has wholly abandoned said pretended initial point, as the point of commencement of their said road, on the western side of said river, and that the said bridge of the said company across the Missouri River is located within the limits of the said order of the President of the United States, made Nov. 17, 1873; and these relators say
169 that, notwithstanding said return, they are entitled to a peremptory writ of mandamus against the defendants, as prayed herein, and pray that the same may issue accordingly.

PUTNAM & ROGERS,
SAPP & LYMAN,
Attys. for Relators.

(Endorsed:) U. S. circuit court, dist. of Iowa. United States ex rel. Hall et al. vs. Union Pacific R. R. Co. Answer to return to alt. writ. Filed Oct. 30, 1874. George B. Corkhill, clerk.

170 U. S. circuit court.

THE UNITED STATES, EX REL. SAM'L E. HALL & AL., *vs.* THE UNION PACIFIC RAILROAD COMPANY. } October term, 1874.

Now come the relators, & upon the writ, return, & answer thereto,
171 move the court for a peremptory writ of mandamus, as prayed herein.

PUTNAM & ROGERS,
SAPP & LYMAN,
Attys. for Relators.

(Endorsed:) Filed Oct. 31, 1874. George B. Corkhill, clerk.

172 United States circuit court, district of Iowa, October term, 1874, Saturday, October 31, 1874.

SAMUEL HALL ET AL. EX REL. *vs.* UNION PACIFIC R. R. CO. } No. 1738. Law.

This cause came on to be heard on the motion of relators for a peremptory writ of mandamus, and the relators appearing by Putnam and Rogers & Sapp & Lyman, their attorneys, and the defendant by A. J. Poppleton and J. M. Woolworth, their attorneys. The motion is, by mutual consent of the parties, submitted to the court to be decided on the merits upon the facts stated in the alternative writ, the return thereto, and the relator's answer to said return, the statements in said answer not being controverted by defendant, and, after argument by counsel on both sides, said motion is taken under advisement by the court and the causes continued.

173 United States circuit court, district of Iowa, May term, 1875, Thursday, May 13, 1875.

THE UNITED STATES EX REL. SAMUEL E. Hall & John W. Morse
vs.
THE UNION PACIFIC RAILROAD COMPANY, ITS officers and agents.
} No. 1738. Law.

The motion made in this cause in behalf of the relators for the issuing of a peremptory writ of mandamus against the respondents, as prayed for, having been argued by counsel on both sides at the last term of this court, and having been then taken under advisement by the court, and the court being now fully advised in respect thereto, it is
174 ordered, in pursuance of application made by counsel for the relators, that the alternative writ issued herein be, and the same is hereby, amended by striking out of the mandatory part thereof the words "and freight and passenger tariffs."

And it is further ordered and adjudged that thereupon a peremptory writ of mandamus do issue, directed to the respondents, conforming in its terms to the alternative writ as so amended, & returnable to the next term of this court.

And it is further ordered and adjudged that the relators recover of the respondent, the Union Pacific Railroad Company, their costs, herein taxed at $, and that they have execution therefor.

And it is further ordered, on the application of counsel for the respondents, that the penalty of the bond to be given by them for a supersedeas on writ of error to be sued out by them upon the foregoing order be fixed at the sum of one thousand dollars, and that the respondents have leave to file affidavits showing the amount in controversy in this cause.

JNO. F. DILLON,
Circuit Judge.

175 U. S. circuit court, district of Iowa, 1875.

UNITED STATES EX REL. HALL ET AL.
vs.
THE UNION PACIFIC RAILROAD COMPANY.

176 1. The charter of the Union Pacific Railroad Company, (12 Stats. at Large, 489, sec. 12,) required its "Iowa branch" to be constructed westward "from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States:" held, on a consideration of various provisions of the charter, that the eastern terminus of said branch was on the Iowa shore of the Missouri River and not on the Nebraska shore, nor at a point on "the middle of the main channel" of the river, although that was the legal western boundary of the State of Iowa.

2. The right to erect a bridge across the Missouri River to the eastern terminus of the Iowa branch on the Iowa shore was given to the Union Pacific Railroad Company, by implication in the original
177 charter of the company, and was expressly conferred by the ninth section of the amended charter of the company of July 2, 1864, (13 Stats. at Large, 356.) The powers given and the duties imposed by these acts in respect to bridges were recognized, increased, and regulated, but not repealed by the special act of February 24, 1871,

entitled "An act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa." (16 Stats. at Large, 430.)

3. This last-named act construed in connection with the other legislation of Congress and held not to change the eastern terminus of the Iowa branch of the Union Pacific Railroad Company from the Iowa shore of the Missouri River, nor to disconnect the bridge from
178 the road of the company, so as to relieve the company from the duty imposed by its charter, and other acts of Congress, to operate its whole railroad as "one continuo's line."
4. A peremptory mandamus to compel the Union Pacific Railroad Company to operate its road over the bridge in the same general manner that it operates the other portions of road, was granted and the devise of a separate transfer over the bridge by a local train held to be in violation of the duty of the company to the public.
5. Amendments in form and substance may be allowed in mandamus proceeding in any stage thereof, where justice will be thereby promoted. In this case the alternative writ was amended by leave of court, by striking out part of its mandate, and the peremptory
179 writ instead of *of* being denied because the alternative writ was too broad was ordered to be issued in conformity to the alternative writ as amended.

180 Before Dillon & Love, JJ.

Eastern terminus of the Union Pacific Railroad Company—Power of company to bridge the Missouri River—Mandamus to compel the company to operate its whole line—On motion for a peremptory writ of mandamus.

This is a proceeding by mandamus to compel the Union Pacific Railroad Company to operate its road as a continuo's line by running its regular through trains to and from the Iowa shore of the Missouri River, at a point within the corporate limits of Council Bluffs, in the
181 State of Iowa, and which point the relators claim to be the eastern terminus of the road. On the other hand the company insist that the eastern terminus, that is, the legal as well as actual terminus of the company's road proper, is on the western shore of the Missouri River, at a point within the corporate limits of the city of Omaha, in the State of Nebraska.

Between the Iowa shore and the Nebraska shore the company has constructed a railway-bridge, the eastern end of which & the approaches thereto are within the limits of the city of Council Bluffs, while the western end & the approaches thereto are within the limits of the city of Omaha.

The western end of this bridge is near the passenger-depot of the company in Omaha, and the rails of the company's road are extended or prolonged over the bridge, so that the company could, if it desired,
182 run its regular trains each way without change over the bridge.

The bridge is located about two miles south of the point in section 10, T. 15, R. 13, known as the initial point of actual construction, but the road between that point and the machine-shops of the company in Omaha has been taken up and abandoned.

The company, instead of running its regular trains to and from the Iowa side of the river, stops them at & starts them westward from Omaha, and it crosses passengers & freights over the bridge by means

of separate and distinct trains called "transfer-trains," under the management of a "Bridge Transfer Company," an organization of its own employees, charging therefor special rates, viz, fifty cents for each passenger and ten dollars for each car, and keeping a separate account of the earnings of the bridge.

183 Through passengers and freights each way cross the bridge by the agency of this transfer company. Passengers from any of the Iowa roads terminating in Council Bluffs, at or near the eastern end of the respondent's said bridge, intending to go West by the respondent's road, instead of directly getting on the regular trains of the respondent, are required to get on a local or transfer train, and on arriving at Omaha to change to the regular train of the company, which is made up and operated from the company's depot in that place. And a like change is necessary to be made by passengers on the respondent's road arriving at Omaha from the West and going East.

The present proceeding is instituted by the relators under the act of Congress of March 3rd, 1873, (17 Stats. at Large, p. 509, sec. 4, last clause,) which provides that the proper circuit court of the U. S.

184 shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law.

The relators claim, under the various provisions of the acts of Congress applicable to the respondent, that it is bound to operate its regular through-trains over the bridge to and from the Iowa side, and that operating bridge in the manner stated through the agency of the transfer company is in violation of the acts of Congress. Indeed, the relators claim that the bridge is in fact an integral part of the road of the company and must be operated as such, & that the company has no legal right to exact or charge special rates or tolls for freight or passengers carried thereon.

185 The alternative writ of mandamus (upon which, & the return & answer thereto, the relators now move for a peremptory writ) commanded "The Union Pacific Railroad Company to operate the whole of its railroad from Council Bluffs westward, including that portion of its road between Council Bluffs and Omaha, and constructed over and across the said bridge, as one continuous line for all purposes of communication, travel, and transportation, and especially to start the regular through freight and passenger trains westward bound from Council Bluffs, & to run its eastward-bound trains of both descriptions through & over the said bridge to Council Bluffs, & to operate the said trains to and from Council Bluffs under one uniform time-schedule and freight & passenger tariff with the remainder of its said road, and to wholly desist and refrain from operating said last-mentioned portion of

186 said road as an independent and separate line, and from causing or requiring freight or passengers bound westward or eastward to be transferred, as aforesaid, at Omaha," or that the company appear and show cause to the contrary.

The company has appeared, and for cause shows substantially the facts herein stated.

The Union Pacific Railroad Company was chartered by Congress July 1st, 1862. (12 Stats. at Large, 489.) The 1st, 7th, 8th, 11th, 12th, 13th, 14th, & 17th sections, particularly the 12th & 14th, bear upon the present controversy.

The act provided for a main-trunk line to run westward from a point on the 100th meridian, at which point it was to connect with branch roads converging there, the northern one having its eastern terminus

at Sioux City, Iowa, the southern at the mouth of the Kansas
187 River, on the south side thereof, and the central (the one here in question) "from a point (sec. 14) on the western boundary of the State of Iowa, to be fixed by the President of the United States."

On the 17th day of November, 1863, President Lincoln, by an Executive order, fixed "so much of the western boundary of the State of Iowa as lies between the north and south boundaries of the U. S. township within which the city of Omaha is situate, as the point from which said line of railroad shall be constructed." But this point was indefinite north & south, as the township was six miles in length, and on March 7th, 1864, the same President, "on the application of the company," did designate & establish such first above-named point on the western boundary of the State of Iowa, east of and opposite to the east
188 line of sec. 10, t. 15, r. 13, in the Territory of *of* Nebraska.

The legal western boundary of the State of Iowa is "the middle of the channel of the Missouri River." (9 Stats. at Large, 52.)

On the 2nd day of July, 1864, (13 Stats. at Large, 356,) the charter of the company was materially amended, by giving to the company increased aid in lands and bonds & by several specific provisions. The original charter contained no express provision as to bridges. The amended charter (sec. 9) on this subject was as follows:

"That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River, and other rivers which its road may pass in its course,
189 and authority is hereby given said corporation to construct bridges over said Missouri River and all other rivers for the convenience of said road, provided that any bridge or bridges it may construct over the Missouri River, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws, etc., and shall be built, kept, and maintained at the expense of said company, in such manner as not to impair the usefulness of said rivers for navigation.

The company commenced in 1869 the construction of the bridge here in question at the point where it now is, but, before it was completed, Congress passed an act, approved February 24th, 1871, having a material bearing upon the present controversy. (16 Stats. at Large, 430.) This enactment is as follows:

190 "An act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge, and approaches, and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and tracks and depots required to perfect the same, as now authorized by law of Congress, and said
191 bridge may be so constructed as to provide for the passage of ordinary vehicles and travel. And said company may levy and collect tolls and charges for the use of the same, and for the use and protection of said bridge and property. The Union Pacific Railroad Company shall be empowered, governed, and limited by the provisions of the act entitled 'An act to authorize the construction of certain

bridges, and to establish them as post-roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto. And provided that nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under exist'ng laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws.

192 "Provided, also, That Congress shall, at all times, have power to regulate said bridge and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars.

"Provided, That if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw."

Under the authority thus conferred to mortgage the bridge, the company, April 1, 1871, mortgaged the same, and its tolls & incomes, to secure bonds to the amount of $2,500,000 in gold, which bonds are now outstanding. But before the said bridge was commenced, viz, November 1, 1865, the company, under authority given by the 10th sec-

193 tion of the act of July 2, 1864, had mortgaged to trustees "all & singular the railroad & telegraph of said company heretofore constructed, or hereafter to be constructed, from a point on the western boundary of the State of Iowa, heretofore fixed by the President of the U. S., to wit, at the city of Omaha," &c., with all lands, rights of way, easements, depot-buildings, & franchises for buildings, and operating the said road, &c., &c., to secure to first-mortgage bonds, of which $27,000,000 are alleged to be outstanding, & the Government has a subordinate lien for many millions of dollars to secure the repayment of the bonds it issued to the company.

The 12th section of the original charter of the company contained, inter alia, this provision:

"The whole line of said railroad and branches and telegraph shall

194 be operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected and continuous line."

The 15th section of the amended charter of 1864 contained the provision—

"The several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line, and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of either of the others."

195 As late as the 20th day of June, 1874, by an act entitled "An act making additions to the 15th section of the act approved July 2, 1864," (the amendatory act of 1864 above referred to, Stats. 1873-'4, 111,) the said 15' section is amended by the addition thereto of the following.

"And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph

under his control, or which he is engaged in operating, for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line, or shall refuse in such operation and use to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of or adverse to the road or
196 business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding $1,000, and may be imprisoned not less than six months."

Further provisions are made for suit by the party aggrieved, (prescribing the courts in which suit may be brought, and the mode of service therein,) "in case of failure or refusal of the Union Pacific Railroad Company or either of said branches to comply with the requirements of this act and the acts to which this act is amendatory."

On other questions this proceeding has already been several times before this court. (2 Dillon, C. C. R., 527 ante p.)

A return has been made to the alternative writ, & an answer there-
197 to been filed, and the case is now before the court on the motion of the relators for a peremptory mandamus.

Jno. N. Rogers for the relators.
J. M. Woolworth & A. J. Poppleton for the railroad company.

198 DILLON, *Circuit Judge:*

In a controversy which has excited intense local feeling, and one involving such large interests, and to which so much attention has been drawn on the part of the public and of Congress, and which has been so fully argued at the bar, the court would be justified in stating with more than usual fulness the grounds of its judgment. But as its determination is not final, and as it is understood that the unsuccessful party, whichever it may be, will carry the order here made, for revision, to the Supreme Court, it is not our purpose to discuss the case with that degree of elaboration we should otherwise do, & which its intrinsic importance would well warrant.

We now proceed to notice the material questions involved
199 in the application for the peremptory writ.

If the road which the respondent is bound to operate has its terminus on the western shore of the Missouri River, as its counsel have contended; in other words, if, under the acts of Congress applicable to the respondent, it was not authorized to build the road it is required to operate to the Iowa shore of the river, it may be conceded that the result would be that the relators would not be entitled to the writ they seek.

What point, therefore, does the charter of the company fix as the commencement of what is therein termed the "Iowa Branch?"

This question is answered by the following language in the act of 1862: "The said Union Pacific Railroad Company is hereby author-
200 ized and required to construct a single line of railroad & telegraph from a point on the western boundary of the State of Iowa to be fixed by the President of the United States."

In the executive orders of November 17th, 1863, and March 7th, 1864, President Lincoln did not undertake to change this provision, but carefully conformed to it. Accordingly, those orders named "the western boundary of the State of Iowa as the point from which the company should construct their branch road to the one hundre'th meridian;"

indisputably, then, the commencement-point of the "Iowa Branch" is on the western boundary of the State of Iowa.

This precise language, as descriptive of the point of commencement, is twice used the section (§ 14) which provides for the building
201 of the branch, and prescribes its commencement, course, and termination. Indeed, the counsel for the company do not deny in argument that the commencement-point of the road, as prescribed by the terms of the charter, is upon the western boundary of Iowa, but they raise a question as to what is the western boundary of that State, and deny that this language means the eastern shore of the river.

The argument of the company's counsel on this subject can best be presented in his own language. He says: "The western boundary of the State of Iowa is the middle of the channel of the Missouri River, (9 Stat. at Large, 52.) The road is to be constructed, then, from a point, to be fixed by the President, in the middle of the main channel of the river. But it is said that is impracticable, and you must put your initial point on the Iowa shore, or a part of the authorized road
202 cannot be built. But there is this rule, that a grant of this kind is to be strictly construed. You cannot go beyond the limits fixed, and if you cannot go to the limits fixed, you must go as near them as you can, always keeping within them. If it is impracticable to begin the road in the middle of the river, you must begin on the Nebraska shore,"

If it be granted that Congress, by use of the words "point on the western boundary of the State of Iowa," as descriptive of the point of commencement of the "Iowa Branch," meant to refer to the legal boundary of the State as declared in 1846, (9 Stats. at Large, 52,) the views of counsel would be sound. And if there is nothing to show that Congress meant some other than the legal boundary, there would be
203 a strong presumption that the legal boundary was the one here intended.

There is, however, in various provisions of the charter of the company, evidence of a very satisfactory character that Congress, in the language under consideration, referred to the boundary of the State on the river other than on the ideal line of the middle of its channel.

It had no question of territorial jurisdiction before it, and hence its attention was probably not drawn to the act of 1846 fixing the legal boundary. Congress in the charter of the respondent meant either the Iowa shore or the middle of the channel of the river; & "from a point on the one or the other" authorized & required the road to be built.

Bearing in mind the nature of a railroad, and the objects for which this road was created and aided by Congress, it will not do to im-
204 pute to that body doubtful language to the singular, the inexplicable purpose of requiring this road to be built to a point on the middle of a wide & rapid stream like the Missouri. One shore or the other of the river was meant, undoubtedly. Which? If the Nebraska shore, why is Iowa mentioned at all? If the Nebraska shore, what propriety is there in referring to the Iowa boundary or in calling the road the "Iowa Branch?"

Again, the same act provides for close & immediate eastern connection with the other branches. The northern branch is to be constructed by this very company "from Sioux City," which is in Iowa, on the eastern shore of the Missouri River, when a line of roads from Minnesota or Iowa shall be completed to that place. And a like close & direct connection is provided for the Missouri branches at St. Joseph & Kansas City, leaving no hiatus or break in the line, and not keeping out of

or beyond the territorial jurisdiction of those States. What
205 reason is there, then, for supposing the Central or Iowa branch was intended to be exceptional in this respect?

The Iowa lines of railway had not then been completed to the Missouri River, & hence could not well be mentioned by name, but it is not lightly to be supposed that Congress in granting the powers & in furnishing the means to construct a great national highway intended to make no provision for crossing a broad & swift stream like the Missouri, known to be at the western end of the Iowa roads, whose completion, so as to connect with the Union Pacific road, was then contemplated and relied on.

Therefore, when the original charter of the company "authorized and required it to construct its railroad from a point on the western boundary of the State of Iowa," it authorized its construction from the Iowa shore, and if a bridge was necessary to meet this requirement
206 then the power to build the bridge was given. Springfield vs. Conn., &c., R. R. Co., (4 Cush., 63.) City of Clinton v. Cedar Rapids, &c. R. R. Co., (24 Iowa, 455, 479.) People vs. R. & S. R. R. Co., (15 Wend., 113, 130.)

Indeed, it might well be urged that not only was authority conferred to build the bridge, but that the duty was imposed to build it as part of its line of railroad necessary to reach the prescribed point of commencement. The company did not need, so far as relates to bridges, the power given to it by the ninth section of the amended charter of 1864 "to establish ferries across the Missouri River & other rivers which its road may pass, in its course," and to construct bridges over said Missouri River, & all other rivers, for the convenience of its road, & to enable it to make convenient and necessary connections with other roads.

207 A bridge built under authority of the act of 1862 or 1864 would be part of the road of the company, or, in the language of the original charter, (sec. 14,) part of its line of railroad constructed from a point on the western boundary of the State of Iowa, just as a bridge in a highway has often been held to be part of the highway itself. (Dillon Munic. Corp., sec. 579.)

If there was doubt as to the right of the company to pass beyond the middle of the river & to go to the Iowa shore, under the original charter of 1862, that doubt is set at rest by the aforementioned ninth section of the amended charter of 1864, which, in terms, authorizes the company to construct a bridge over the Missouri River, which presupposes that the eastern end of it shall rest upon the Iowa shore, and this is done, so Congress declares, "to enable the Union Pacific
208 Railroad to make convenient and necessary connections with other roads."

The bridge was to be built by the Union Pacific Railroad Company. No provision was made for a bridge company or for stock or capital for bridge purposes, and if the structure had been built under authority thus conferred, and no other, there could be no doubt that it would have been part of the road of the company in such a sense that the company would have been bound to operate it as much as it was bound to operate any other part of its line.

It appears from the return to the alternative writ that the company, under the authority thus given, & not otherwise, commenced the construction of the bridge here in question in 1869. It proved to be a difficult and expensive undertaking, and in 1871 the structure was far from being completed. On the 24 day of February, of that year, Con-

209 gress passed "an act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa." (16 Stats. at Large, 430.)

This enactment is supposed by the defendant to have a controlling effect on the present controversy, and it undoubtedly has an important bearing upon it. It is given in full in the statement of the case.

It authorizes the Union Pacific Railroad Company to make a mortgage "on the bridge & approaches & appurtenances," & to issue bonds not to exceed $2,500,000 to be secured by such mortgage.

Notwithstanding the rule of law that authority to levy & collect tolls must be plainly conferred, and the able argument of the relator's counsel on this point, it is clear to our minds that Congress gave
210 by this act to the company the right "to levy and collect tolls and charges for the use of the bridge," reserving in the second proviso the "power at all times to regulate said bridge and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for." It is manifest from this language that tolls & charges other than those for local travel was contemplated as being within the competency of the company to levy & collect for the use of the bridge. Besides, the chief value of the bridge as a security would be the tolls, and the authority to make a mortgage for $2,500,000 on the mere bridge structure and approaches, without the right to levy tolls & pledge the same to the lender, would doubtless have proved a barren power, since it would be quite impossible to negotiate such a security.

211 It is evident from the tenor of the bridge mortgage that all the parties to that instrument thus understood the act of 1871.

The act contains also the important provision that it shall not "change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor release said company from its obligations under existing laws."

It also contains a clause adopting, as far as applicable to the bridge in question, the provision of the bridge act July 25, 1866. (14 Stats. at Large, 244.) The act also contains a clause authorizing the bridge to be "so constructed as to provide for the passage of ordinary vehicles," but this privilege was not used, and so need not be considered.

212 The bridge act of 1871, it is to be observed, does not profess to repeal the provisions, authority, express or implied, on the part of the company to bridge the Missouri River, but only to confer additional powers, & to make additional provisions. All the provisions of the several acts are to be read together, and thus viewed, the respondent would have inter alia the following rights and powers in respect to the bridge in question:

1. To build it under the original & amended charter as part of its road from a point on the Iowa shore.

2. Under the act of 1871 it was so far disconnected from the road as to authorize it to be separately mortgaged as a bridge, & to empower the company to levy & collect tolls & charges for the use of the same, as a bridge, or compensation for the use of it by other railroads constructed to the Missouri River, at or near Council Bluffs
213 & Omaha, Congress reserving the power to regulate the bridge & the rates for transportation of freights and passengers over the same. But it was expressly provided that this act should not change the then existing eastern terminus of the company's road, nor release the company from its obligations under existing laws. By this last pro-

vision it was doubtless intended to declare that the eastern terminus of the road should remain where it had before been established & then existed, namely, on the Iowa shore, and that the existing obligations of the company springing from that fact should remain in full force.

One of these obligations is that while the bridge-mortgage remains unforeclosed, & the bridge is in possession of the company, the company must operate it as part of its road, which it has never ceased to
214 be, although it may, under the act of 1871, charge special rates for its use, subject to the control of Congress.

Three several times, first in the act of 1862, (sec. 12,) then in the act of 1864, (sec. 15,) and lastly, as late as June 20, 1874, has Congress required the respondent "to operate & use its road for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuo's line."

This last act even goes so far as to make it criminal on the part of controlling officers or agents of the companies, or either of the companies, to refuse thus to operate the roads, or either of them, thus demonstrating that Congress intended that each road, singly, as well as all the roads constituting part of the system of Pacific roads contemplated by the acts of 1862 & 1864, should be operated without breaks
215 or unnecessary delays, as a continuo's line, without favor or discrimination towards either persons or localities.

If we are right in the position that the eastern terminus of the road of the respondent is on the Iowa shore, then inasmuch as the bridge-act of 1871, upon the respondent so strongly relies, declares that such terminus remains unchanged notwithstanding that act, the conclusion necessarily follows that the respondent must operate its trains over the bridge under its control as a part of a continuo's line of road and operate them over its entire line of road from terminus to terminus. Such duty has been enforced by mandamus, without such specific legislation as Congress has provided in this behalf by this act of March 3, 1873, (17 Stats. at Large, 509, sec. 4, last clause,) which in terms gives to
216 the proper circuit court of the U. S. jurisdiction to hear & determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. (The State v. Hartford, &c., R. R. Co., 29 Conn., 538; Rex v. Severn & Wye Ry. Co., 2 Barn. & Ald., 646.)

Suppose the respondent should habitually stop its regular trains two miles west of Omaha, & refuse to run them eastward of that point or only run transfer trains, is there any doubt, under the legislation of Congress, that it could be compelled to operate & run its regular trains into that city? And so in the case before us, *of* the bridge on to which its track is extended is to be considered a part of its road, within the meaning of the acts of Congress requiring it to operate its whole line without any break in its continuity.

In this view the transfer device of the company putting
217 passengers & shippers of freight to unnecessary delay, inconvenience, & expense, is in violation of the duty which the company owes to the public. It is an indefensible obstruction to the public.

If made by the company with third persons, without legislative authority, it would be ultra vires. It is none the less objectionable that it is made with its own employees.

A point is made by the respondent against the writ on the ground that the bridge structure is not opposite section 10, as fixed by the President, but some two miles down the river.

In point of fact, after getting bonds & lands by reason of that location,

the company has abandoned the track through section 10, and instead of crossing the river opposite that section has constructed its road
218 so as to connect with the present bridge. If this change in the location of the bridge from section 10 was authorized by an implied effect of the act of 1871, applied to the subject-matter, the objection under consideration fails.

Originally under the order of President Lincoln the bridge should have been constructed so as to reach the Iowa shore east of and opposite section 10. Instead of doing this the company commenced a bridge at the site of the present one, two miles south. Congress in 1871 authorized that bridge to be completed & mortgaged, thereby legalizing the change, & doubtless relieving the company of the duty of bridging the stream opposite section 10; and therefore when Congress also said that the act of 1871 in relation to the bridge should not "change the eastern terminus of the road from the place where it is now fixed under existing laws," it did not mean that the company should still be
219 under an obligation to build a bridge opposite sec. 10, but that the Iowa shore should, notwithstanding the bridge act, remain the eastern terminus of the road, & the company's obligation in this regard should remain. But if the change in the location of the bridge was not authorized by the act of 1871, still the company ought to be estopped to say we have reached our eastern terminus at the wrong place, & hence cannot be compelled to operate the whole length of our actual line of road.

Again, it is suggested by the respondent's counsel that this view, if sound, necessarily has the effect to subordinate the bridge-mortgage for $2,500,000, which was intended to be a first lien upon the bridge as well as its tolls, to the prior mortgage of the company upon its entire line of road. These respective mortgages are not before us, and their
220 rights cannot touched by any here decided.

We content ourselves, therefore, with the remark that, on observing the terms of the two instruments, we do not see that the result suggested necessarily flows from the positions we have attempted to maintain.

It were premature at this time to anticipate that there will be a sale under the bridge-mortgage and to consider the rights of the purchaser, of the company, of the public, or of the Government after that event.

Two technical points are made by the respondent:

The first is that no demand is averred, under the circumstances of this case, this objection being made for the first time at the hearing on the merits, & the duty being a public one, which the respondent has
221 all the time denied to exist, comes too late. The object of a demand is to give the option to do or refuse that which is demanded, and it is evident that a demand by the relators would not have obviated the necessity for this proceeding to determine the contested question of public right and public duty here involved. (Dillon Munic. Corp., sec. 696.)

The other point is more substantial, & indeed fatal to the application, in its present form, for the peremptory writ, unless the objection can be avoided by amendment. The proceedings by mandamus at common law are characterized by unreasonable strictness, & one established rule of practice in the Queen's Bench is that mandate of the peremptory writ cannot be molded by the court after a hearing upon the return to the alternative writ, but the peremptory writ must be denied alto-
222 gether, unless the sphere of its mandate is exactly coincident to the mandate of the alternative writ. (Queen vs. East., &c., Railroad Co., 2nd El. & Bl., 466; 3 Ad. & Ell., 534; 14 ib., N. S., 459.)

If the propositions heretofore advanced are correct, the mandate of the alternative writ was too broad, in that it commanded the defendant to operate the bridge under a uniform tariff of freights & fares with the residue of the road. We hold that the defendant may, under the act of 1871, exact special tolls & charges for the use of its bridge.

Anticipating that this might be the view of the court, the relator's counsel have, in that event, asked leave to amend by striking out of the mandate of the alternative writ the words "and freight & passenger tariff," & that the peremptory writ issue so as to conform to the alternative writ as thus amended.

223 Undoubtedly this amendment ought to be allowed. In this country and at this day the writ of mandamus has lost its prerogative character, and the proceedings are governed by the same liberal rules which obtain in ordinary legal remedies. "Accordingly," says Chief-Justice Taney, "the right to the writ and the power to issue it have ceased to depend on any prerogative power, and it is now regarded as an ordinary process in the cases to which it is applicable. It is a writ to which every one is entitled, where it is the appropriate process for asserting the right he claims." (Kentucky vs. Dennison, 24 How., 66.)

In our judgment the true rule is to allow on proper terms amendments in proceedings by mandamus, at all times, both as to form & substance, in the interest of justice.

224 In England, 9 Ann, ch. 20, sec. 7, extended the statutes of jeofails "to all writs of mandamus and all the proceedings thereon." Speaking of the power to allow amendments, Mr. Justice Strong, delivering the judgment of the supreme court of Pennsylvania, remarks: "Formerly, when the doctrine of amendments remained as at common law, the court would not allow the writ of mandamus to be amended after return filed; but, as is said by Tapping, (p. 334,) the strict rule of the common law has been of late years altogether departed from, the principle as to amendments being that it shall be allowed in all cases when such a course will promote justice." (Comw'lth vs. Pittsburgh, 34 Pa. St., 496, 515.) And such is unquestionably the American practice. (Dillon Munic. Corp., secs. 699, 701, & cases cited. High on Extr. Rem., 519.) And the allowance of such amendments is within the spirit, if not indeed within the terms, of the liberal provisions as to

225 amendments in the thirty-second section of the judiciary act.

The power there given to allow amendments is broad, extending "to any defect," and should not ordinarily be confined to defects of form, & should be liberally viewed, & the power given liberally exercised to promote justice.

Guided by these considerations, why should the relators be denied the power to amend to conform to the views of the court on proper terms, & compelled to commence anew?

The defendant, it is to be supposed, has & feels no other interest in this controversy than to have its public duty authoritatively settled, and this can be as well done in this proceeding by allowing the amendment as by compelling the relators to retrace all their steps by commencing de novo.

Let an order be entered allowing the proposed amendment

226 to the alternative writ, & thereupon directing the peremptory writ to issue conformed to the alternative writ as amended.

Ordered accordingly.

Love, J., concurs.

227 In the Supreme Court of the United States.

THE UNION PACIFIC RAILROAD COMPANY, PLFF. in error,
vs.
THE UNITED STATES EX REL. SAML. E. HALL and JOHN W. MORSE, defts. in error.

228 The said Union Pacific Railroad Company comes into court by its counsel, and prays the reversal of the judgment of the circuit court of the United States for the district of Iowa in the above-entitled cause, and avers that there is error in the record and proceedings in said cause, and thereupon assigns the following as such errors:

I. The court erred in holding that it had jurisdiction of the parties and the subject-matter of the action.

II. The court erred in holding that the said Samuel E. Hall and John W. Morse could lawfully become relators on behalf of the public in this suit, without the assent or direction of the Attorney-General of the United States or the United States district attorney for the district of Iowa.

229 III. The court erred in holding the fourth section of the act of Congress of March 3, 1874, entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1874, and for other purposes," constitutional and valid, and giving effect thereto.

IV. The court erred in holding that the lawful eastern terminus of the so-called Iowa Branch of the Union Pacific Railroad is on the Iowa side of the Missouri River, and within the jurisdiction of that State.

V. The court erred in holding it to be a duty obligatory upon said Union Pacific Railroad Company to run its through freight
230 and passengers trains to and from the Iowa side of the Missouri River.

VI. The court erred in holding that to operate said Union Pacific Railroad and its branches as a continuous line is to operate said company's main trunk, and each branch thereof, as a continuous line.

VII. The court erred in holding that the fourth section of the act of Congress aforesaid is applicable to the facts appearing from the alternative writ, and the return thereto, and authorized and justified the granting of the relief prayed for.

VIII. The court erred in holding the bridge erected and main-
231 tained by said railroad company over the Missouri River at Omaha a part of the railroad of said company, and that it is a duty obligatory upon said Union Pacific Railroad Company to erect and maintain and operate the same.

IX. The court erred in holding that the act of Congress approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the acts amendatory thereof, empowered said railroad company to build, maintain, and operate a railroad within the boundaries and jurisdiction of the State of Iowa.

232 X. The court erred in allowing an amendment of the alternative writ.

XI. The court erred in awarding the peremptory writ and ordering the issuing of the same.

The said respondent, The Union Pacific Railroad Company, therefore prays that the said judgment may be reversed by the Supreme Court of the United States.

A. J. POPPLETON,
J. M. WOOLWORTH,
Counsel for Plaintiff in Error.

(Endorsed:) U. S. Supreme Court. Union Pacific R. R. Co., plff. in error, vs. United States ex rel. Hall and Morse, defts. in error, ass'g't of errors. Filed for plffs. May 27, 1875. George B.

233 *Affidavit of value of matter in controversy.*

In the circuit court of the United States for the district of Iowa.

UNITED STATES EX REL. HALL AND MORSE
vs.
THE UNION PACIFIC RAILROAD COMPANY.

STATE AND DISTRICT OF NEBRASKA, *ss:*

234 S. H. H. Clarke, being by me first duly sworn, on oath deposes and says that he now is and for more than a year last past has been the general superintendent of the Union Pacific Railroad Company at Omaha, Nebraska, and that before that time and since the year 18 , he was assistant general superintendent thereof, being located at the same place; that such capacity as aforesaid he has become and now is familiar with the management and operation of said road and the operation of the railroad bridge erected over the Missouri River at Omaha by said company, and the cost and expense of operating the same; that in order to comply with the peremptory writ of mandamus of the circuit court of the United States for the district of Iowa in the case of The United States ex rel. Hall and Morse vs. The Union Pacific Railroad Company, as ordered on the 14th day of May, A. D. 1875, at Des Moines, Iowa, commanding said Union Pacific Railroad Company "to operate the whole
235 line of your road from Council Bluffs westward, and including that portion of your said road between Council Bluffs and Omaha, and constructed over and across said bridge, as one continuous line for all purposes of communication, travel, and transportation, and especially to start your through freight and passenger trains westward bound from Council Bluffs, and run your eastern-bound trains through and over said bridge to Council Bluffs," the said railroad company will be subjected to large additional expense over and above the cost and expense of operating the bridge as heretofore operated, viz, starting their trains westward from Omaha, and running them eastward to Omaha; that such additional cost and expense consists in the costs and expense of its passenger and freight trains, the additional distance from Omaha to the so-called transfer grounds at Council Bluffs,
236 a distance of about three miles, and back again to Omaha, where are situated the general offices, headquarters, and repair and manufacturing shops of said company, and that such additional cost and expense will not be less than per annum; that compliance with said peremptory mandamus will not dispense with the necessity of a transfer train as heretofore, as well while complying with the command of said writ as before the same was ordered, and that the erection of repair and manufacturing shops and other structures on the Iowa side of the river, sufficient to house, repair, and outfit its trains on that

side of the river, would involve an additional expense and cost to the company largely in excess of the amount above mentioned, and not less, as affiant believes, than fifty thousand dollars, while all its repair and manufacturing shops, buildings, and structures necessary to house, outfit, and repair its trains, and keep its equipment and rolling-stock
237 in order for efficient service in Omaha are already ample and sufficient for that purpose, and fully paid for.

Affiant further says that the value of the matter in controversy in the said writ is not less than fifty thousand dollars, and, as affiant verily believes, largely exceeds that sum.

S. H. H. CLARKE.

Subscribed in my presence and sworn to before me this 25th day of May, 1875.

WATSON B. SMITH,
U. S. Circuit Court Commissioner for the District of Nebraska.

(Endorsed:) U. S. C. C., dist. of Iowa. United States ex rel. Hall and Morse. Aff't of S. H. H. Clark. Filed May 27, 1875. George B. Corkhill, clerk.

238 *Affidavit of value of matter in controversy.*

In the circuit court of the United States for the district of Iowa.

UNITED STATES EX REL. HALL AND MORSE }
vs.
THE UNION PACIFIC RAILROAD COMPANY. }

STATE AND DISTRICT OF NEBRASKA, *ss:*

239 JOSEPH W. GANNETT, being by me first duly sworn, on oath deposes and says that he now is, and since the year 1869 has been, the auditor of the Union Pacific Railroad Company at Omaha, Nebraska, and in that capacity has become and now is familiar with the management and operation of said road, and the operation of the railroad bridge erected by said company over the Missouri River at Omaha, and the cost and expense of operating the same; that in order to comply with the peremptory writ of mandamus of the circuit court of the United States for the district of Iowa in the case of the United States ex rel. Hall and Morse vs. The Union Pacific Railroad Company, as ordered on the fourteenth day of May, 1875, at Des Moines, Iowa, commanding said Union Pacific Railroad Company "to operate the whole line of your road from Council Bluffs westward, and including that portion of your said road between Council Bluffs and
240 Omaha, and constructed over and across said bridge, as one continuous line for all purposes of communication, travel, and transportation, and especially to start your through freight and passenger trains westward bound from Council Bluffs, and run your eastern-bound trains through and over said bridge to Council Bluffs," the said railroad company will be subjected to large additional expense over the cost and expense of operating the road and bridge as heretofore operated, viz, starting their trains westward from Omaha, and running them eastward to Omaha; that such additional cost and expense consists in the cost and expense of operating its passenger and freight trains the additional distance from Omaha to the so-called transfer grounds in Council Bluffs, a distance of about three miles, and back

again to Omaha, where are situated the general offices, head-
241 quarters, and repair and manufacturing shops of said company, and that such additional cost and expense will not be less than $50,000 per annum; that compliance with said peremptory mandamus will not dispense with the necessity of a transfer train, but that it will be necessary to run said transfer train as heretofore, as well while complying with the command of said writ as before the same was ordered, and that the erection of repair and manufacturing shops and other structures on the Iowa side of the river, sufficient to house, repair, and outfit its trains on that side of the river, would involve an additional expense and cost to the company largely in excess of the amount above mentioned, and not less, as affiant believes, than $100,000, while all its repair and manufacturing shops, buildings, and structures necessary to house, outfit, and repair its trains, and keep its equipment and rolling-stock in order for efficient service in Omaha are already ample and sufficient for that purpose, and fully paid for.

242 Affiant further says that the value of the matter in controversy in the said suit is not less than fifty thousand dollars, and, as affiant verily believes, largely exceeds that sum.

JOSEPH W. GANNETT.

Subscribed in my presence and sworn to before me this 25 day of May, 1875.

WATSON B. SMITH,
U. S. Circuit Court Commissioner for the District of Nebraska.

(Endorsed:) U. S. cir. court, district of Iowa. United States ex rel. Hall and Morse vs. The U. P. R. R. Co. Aff't of J. W. Gannett. Filed May 27, 1875. George B. Corkhill, clerk.

243 In the circuit court of the United States for the district of Iowa.

UNITED STATES EX REL. HALL AND MORSE
vs.
THE UNION PACIFIC RAILROAD COMPANY.

STATE AND DISTRICT OF NEBRASKA, *ss:*

244 Thomas L. Kimball, being by me first duly sworn, on oath deposes and says that he now is, and since the year 1871 has been, the general ticket-agent of the Union Pacific Railroad Company at Omaha, Nebraska, and in that capacity has become and now is familiar with the management and operation of said road, and the operation of the railroad bridge erected by said company over the Missouri River at Omaha, and the cost and expense of operating the same; that in order to comply with the peremptory writ of mandamus of the circuit court of the United States for the district of Iowa in the case of the United States ex rel. Hall and Morse vs. The Union Pacific Railroad Company, as ordered on the fourteenth day of May, 1875, at Des Moines, Iowa, commanding said Union Pacific Railroad Company "to operate the whole line of your road from Council Bluffs westward, and including that portion of your said road between Council Bluffs and Omaha, and con-
245 structed over and across said bridge, as one continuous line for all purposes of communication, travel, and transportation, and especially to start your through freight and passenger trains westward bound from Council Bluffs, and run your eastern-bound trains through and over said bridge to Council Bluffs," the said railroad company will

be subjected to large additional expense over the cost and expense of operating the road and bridge as heretofore operated, viz, starting their trains westward from Omaha, and running them eastward to Omaha; that such additional cost and expense consists in the cost and expense of operating its passenger and freight trains from Omaha to the so-called transfer grounds at Council Bluffs, a distance of about three miles, and back again to Omaha, where are situated the general offices, head-
246 quarters, and repair and manufacturing shops of said company, and that such additional cost and expense will not be less than fifty thousand dollars per annum; that compliance with said peremptory mandamus will not dispense with the necessity of a transfer train, but that it will be necessary to run said transfer train as heretofore, as well while complying with the command of said writ as before the same was ordered, and that the erection of repair and manufacturing shops and other structures on the Iowa side of the river sufficient to house, repair, and outfit its trains on that side of the river, would involve an additional expense and cost to the company largely in excess of the amount above mentioned, and not less, as affiant believes, than one hundred thousand dollars, while all its repair and manufacturing shops, buildings, and structures necessary to house, outfit, and repair its
247 trains and keep its equipment and rolling-stock in order for efficient service in Omaha are already ample and sufficient for that purpose, and fully paid for.

Affiant further says that the value of the matter in controversy in the said suit is not less than fifty thousand dollars, and, as affiant verily believes, largely exceeds that sum.

THOS. L. KIMBALL.

Subscribed in my presence and sworn to before me this 25th day of May, 1875.

WATSON B. SMITH,
U. S. Circuit Court Commissioner for the District of Nebraska.

(Endorsed:) U. S. cir. court, dis. of Iowa. United States ex rel. Hall and Morse vs. The U. P. R. R. Co. Aff't Thos. L. Kimball. Filed May 27, 1875. George B. Corkhill, clerk.

248 Know all men by these presents that we, Alvin Saunders, J. H. Millard, and Herman Kountze, residing in the State of Nebraska, are held and firmly bound unto the United States in the full and just sum of one thousand ($1,000) dollars, to be paid to the said United States, their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,
249 executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of May, A. D. 1875.

Whereas, lately, at a term of the circuit court of the United States for the district of Iowa, in a suit depending in said court between the United States upon the relation of Samuel E. Hall and John W. Morse as plaintiffs, and the Union Pacific Railroad Company respondent, judgment was rendered against the said Union Pacific Railroad Company, and the said Union Pacific Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid action, and a citation addressed to the said United States ex rel. Samuel E. Hall and John W. Morse,

citing and admonishing them to be and appear at a Supreme
250 Court of the United States to be holden at Washington the second Manday of October next: Now the condition of the above obligation is such that, if the said Union Pacific Railroad Company shall prosecute its writ of error to effect, and answer all costs and damages if it fail to make its plea good, then the above obligation to be void; else to remain in full force and effect.

J. H. MILLARD. [L. S.]
ALVIN SAUNDERS. [L. S.]
HERMAN KOUNTZE. [L. S.]

Sealed and delivered in presence of—
A. J. POPPLETON.

Approved:

J. M. LOVE, *Judge.*

(Endorsed:) U. S. C. C., dist. of Iowa. United States ex rel. Hall and Morse vs. The U. P. R. R. Co. Bond for appeal. Filed May 27, 1875. George B. Corkhill, clerk.

251 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel E. Hall and John W. Morse, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein the Union Pacific Railroad Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court, at Des Moines, this 27 day of May, A. D. 1875.

J. M. LOVE, *Judge.*

252 Due service of the within citation is hereby acknowledged. May 27th, 1875.

JOHN N. ROGERS,
Atty. for Samuel E. Hall & John W. Morse, Relators.

Filed May 27, 1875. George B. Corkhill, clerk.

(Indorsement on cover:) No. 584. The Union Pacific Railroad Company, plaintiff in error, vs. Samuel E. Hall and John W. Morse. Iowa C. C. U. S. Filed 13th September, 1875.

UNION PACIFIC RAILROAD COMPANY—ITS EASTERN TERMINUS—MISSOURI RIVER BRIDGE AT OMAHA, AND BRIDGE TRANSFER.

Supreme Court

OF THE UNITED STATES.

UNION PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

UNITED STATES, EX. REL., SAMUEL E. HALL AND JOHN W. MORSE,

Defendants in Error.

Mandamus to compel the Union Pacific Railroad Company to operate its Bridge at Omaha, as a part of its Railroad.

Argument of A. J. POPPLETON, for the Railroad Company, Plaintiff in Error.

OMAHA, NEBRASKA:
GEORGE W. GRAY, BOOK AND JOB PRINTER.
1875.

Supreme Court

OF THE UNITED STATES.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

UNITED STATES EX. REL. SAMUEL E. HALL AND JOHN W. MORSE,
Defendants in Error.

ARGUMENT FOR THE RAILROAD COMPANY.

Statement of Case.

This was an action brought by Samuel E. Hall and John W. Morse, residents of Council Bluffs, Iowa, for a mandamus to compel the Union Pacific Railroad Company to operate its Missouri River Railroad Bridge at Omaha, as a part of its railroad by *continuous* trains and at a *mileage* tariff on freight and passengers. The United States, though nominally a party, did not institute or authorize the proceeding and has not participated in its prosecution. It is a private suit, ostensibly instituted on behalf of the public for the redress of alleged individual grievances. The foundation of the proceeding is section 4, of an Act of Congress, approved March 3, 1873, (Statutes Vol. 17, P. 509), the last clause of which is as follows:

"The proper Circuit Court, of the United States shall have jurisdiction to hear, and determine all cases of mandamus, to compel said Union Pacific Railroad Company, to operate its road as required by law."

Under authority of its charters, granted by Congres, (Act of July, 1862 and July 2, 1864, Statutes 12, P. 489; 13, P. 356,) the Union Pacific Railroad Company commenced the construction of its Railroad on the Nebraska bank of the Missouri River, and about three miles north of the site, on which now stands its Missouri River Bridge. From that point, upon a route approved by the President of the United States, as required by law, it built its road. Its construction was commenced in 1864, but no considerable amount of work done. In 1865, the work was resumed with vigor, and the whole road completed to a junction with the Central Pacific, of California, in May, 1869. Upon this line the subsidies were delivered, the land grant administered and its trains not only run without objection from the United States, but with the express approval of all their officers from the President down. The construction and operation of so long a line of railroad, required large expenditures for shops, round houses, car manufactories, foundries and other means of providing, equipping, outfitting and repairing trains, and all these at great cost and in great perfection were gradually accumulated and are still maintained at Omaha.

In 1869, efforts were made to organize the construction of a Railroad Bridge over the Missouri, as a means of connection between Railroads terminating on either bank of the river, but owing to the difficulty of construction, the immense estimated cost and the conflict of opinion among engineers, as to the practicability of erecting a Railroad Bridge over the Missouri River, the scheme was temporarily abandoned and the Company decided to invoke further legislation of Congress. This movement resulted in the Act of Congress, of Feb. 24, 1871, (Stat. 16, P. 430), and it was only by the passage of this Act, that the erection of the Bridge over the Missouri was assured, and only after its passage that the work was vigorously prosecuted.

The Bridge having been completed ready for business, in April, 1872, a controversy at once arose as to its character and the obligations of the Company in respect to it. The Company, on the one hand, claimed that the Bridge was not a part of its railroad; that it was under no legal obligation to operate it by running trains thereon, but that it was built as a means of connecting its own and other Railroads terminating on the Nebraska bank of the river, with those terminating on the Iowa bank; that it had not, and did not claim the exclusive use thereof, but must admit the cars and trains of other roads upon and over it, and was entitled in the language of the act of Congress to "levy and collect tolls and charges, for the use of the same;" and that the law, fixing its duties and liabilities was the general bridge Act of July 25, 1866, (Statutes Vol. 14, P. 244). On the other hand, it was claimed by some, and especially by the citizens of Council Bluffs, Iowa, that the bridge was a mere extension of the road, and part and parcel thereof. That the Company was under legal obligation to operate it as a part thereof, by starting its trains from, and running them to the Iowa shore of the Missouri River, and that the imposition of tolls upon freight and passengers crossing said bridge, was an arbitrary exaction, wholly unauthorized by law. About the same time the Legislative Assembly of Iowa, passed an Act, (lately declared unconstitutional and void, by the Supreme Court of that State), prohibiting under heavy penalties, the railroads of that State from running either their freight or passenger trains over the bridge, or delivering either freight or passengers outside the boundaries of Iowa. Under this condition of affairs, to avoid the obstruction and delay of business which would otherwise result, while insisting upon the correctness of its position, the Union Pacific Railroad Company determined to operate the bridge by transfer trains, and by an organization of its own employees. It accordingly perfected such organization, and has continued it until the present time. This proceeding therefore, instituted by private parties, under the Statute heretofore cited, seeks to compel the Company to adopt the Iowa theory, of its duties

and obligations and remove the base of operation of its Railroad, with its ten years of accumulations, built up under the sanction and with the approval of the Government, from Omaha, Nebraska, to Council Bluffs Iowa. Also to stop the imposition of tolls, for carriage over said Bridge, and collect only a mileage tariff.

Abstract of Alternative Writ and Return.

The alternative writ recites the legislation of Congress chartering the Union Pacific Railroad Company, and authorizing the construction of its Railroad, the executive orders of President Lincoln, fixing its eastern terminus alleges that said terminus is on the Iowa side of the Missouri River, and within the corporate limits of Council Bluffs, that under and in pursuance of said legislation, said Railroad Company constructed a Railroad Bridge across the Missouri River, between the cities of Omaha and Council Bluffs, and built a Railroad track over the same. That said road constitutes a great thoroughfare for the trade, travel and transportation of the country, in connection with railroads constructed through Iowa, which in turn connect with other railroads at Chicago, running to the Atlantic seaboard. That the Union Pacific Railroad Company in violation of the requirements of the acts of Congress, has failed and refused and still neglects and refuses to operate its road from its Eastern terminus at Council Bluffs, to its Western terminus at Ogden, for purposes of communication, travel and transportation, as one continuous line, but on the contrary, it has hitherto started its West-bound trains of both descriptions from Omaha, Nebraska, and stopped its East-bound at the same place, treating Omaha as its Eastern terminus, and that it has operated that portion of its track extending over its Railroad Bridge, through a separate and independent organization, known as the Omaha Bridge Transfer, and upon an independent Time Schedule, and for a separate and distinct fare to the detriment of the public and the relators who are merchants doing business at Council Bluffs.

The return of the Railroad Company recites the charter of the Company, and the provisions of law, authorizing the President to fix the point *from* which its Railroad should be built, alleges that by two successive executive orders, dated respectively Nov. 17, 1863, and March 9, 1864, the President fixed such point: "East of, and opposite to the East line of Section 10, in Township 15, North Range 13, East of the 6th Principal Meridian, in the Territory of Nebraska. That afterward the Railroad Company *located and established the precise point from which* its Omaha branch should be built on the Eastern Boundary of said Section, and on the Nebraska Bank of the Missouri River, and surveyed its route Westward, to the Eastern terminus of the main track on the 100th Meridian. That it filed a map of said terminus and route so fixed and established, as shown in "Exhibit A," attached to this argument, in the Interior Department; and that said map, showing the terminus and route, as so established, was in November, 1864, expressly approved and adopted by the President, and that the same was built from such initial point and on such route, and examined, approved and accepted by the United States, and the subsidy bonds issued and the land grant administered upon, and according to the location of such Eastern terminus and route, so established and fixed, on the East line of Section 10, and on the Nebraska side of the Missouri River, that by means of the premises, the Eastern terminus became and was located and fixed at the point aforesaid, and has never been changed. That the Omaha branch of said road was built and accepted by the Government in the year 1867, and has ever since been operated and run on the route so established, to and from its Eastern terminus at Omaha. That in 1869, the railroad Company, under the provisions of the ninth Section of the Act of Congress, of July 2, 1864, commenced the construction of a railroad bridge across the Missouri River, and under the Act of Congress of Feb. 24, 1871, completed the same, ready for the passage of trains, at a point about three miles South of the point so established, as its Eastern terminus, alleges the execution of a mortgage on the bridge,

in pursuance of the authority of the Act of Feb. 24, 1871, for the purpose of raising money for its construction, and sets out the terms and conditions thereof.

The return further alleges, that the Railroad Company being advised, and believing that said bridge did not constitute a part of its road, and that it was not bound by law to run trains over it, but rather to permit and allow the trains and cars of other Railroad Companys to cross over said bridge for reasonable tolls, and because the Iowa roads, referred to, allow their trains and cars to cross said bridge for the purpose of preventing delay and damage to the public, said Railroad Company has run over said bridge, so called Transfer Trains, and for the purpose of keeping a separate account of its business and applying its earnings to the purposes specified in the bridge mortgage, has maintained a separate organization of its own employees, known as "Omaha Bridge Transfer," and that it has charged and collected the tolls allowed by the Act of Congress, of February 24, 1871. That being advised, and believing that no part of its Railroad, authorized by Act of July 4, 1862, and July 2, 1864, extended East of the West bank of the Missouri River, and that said Railroad Bridge is not a part of its Railroad, and that it was not bound by law to send its trains over the same, it erected its repair and manufacturing shops, round houses and structures and appliances for repairing and outfitting its trains, cars and locomotives, in the city of Omaha, Nebraska, and that the same with the machinery therein, are of great value; that it has erected large and commodious passenger and freight depots, suitable and ample for the accommodation of its business and the transfer and delivery thereof to connecting roads, and that it is inconvenient and against the interest of said Company, to be compelled to start and terminate its trains at a point three miles from its works and depots, and on the Iowa side of the river. That without the collection of tolls said Company is deprived of the power to comply with the conditions of the Bridge mortgage, and that for the Court to declare the bridge a part of the road, to be operated

without toll will greatly depreciate, if not destroy the value of the securities issued under the act of Feb. 24, 1871, out of the proceeds of which the bridge was built; that through freight, when transferred at all, is transferred in about equal proportions, at Omaha and Council Bluffs, and that local freight received at Council Bluffs, is immediately delivered to, and placed in the proper trains on the West bank of the river, and that in neither case is there any unnecessary detention or delay; and that the whole business of the interchange of freight is transacted in the manner provèd by experience to be most convenient to the Company and the shipper.

The case was heard upon the writ and return thereto, and the Court awarded the peremptory writ.

Upon this judgment the following assignment of errors was made and the case brought to this court by writ of error.

Assignment of Errors.

I.

The Court erred in holding that it had jurisdiction of the parties, and the subject matter of the action.

II.

The Court erred in holding that the said Samuel E. Hall, and John W. Morse, could lawfully become relators on behalf of the public, in this suit, without the assent or direction of the Attorney General of the United States, or the United States District Attorney, for the District of Iowa.

III.

The Court erred in holding the fourth Section of the Act of Congress of March 3, 1873, entitled, "An Act, making appropriations for the Legislative, Executive, and Judicial expenses of the Government, for the year ending June 30, 1874, and for other purposes," constitutional and void, and giving effect thereto.

IV.

The Court erred in holding that the lawful Eastern terminus of the so-called Iowa branch of the Union Pacific Railroad is on the Iowa side of the Missouri River, and within the jurisdiction of that State.

V.

The Court erred in holding it to be a duty obligatory upon said Union Pacific Railroad Company to run its through freight and passenger trains to and from the Iowa side of the Missouri River.

VI.

The Court erred in holding, that to operate said Union Pacific Railroad, and its branches, as a continuous line is to operate said Companys main trunk and each branch thereof as a continuous line.

VII.

The Court erred in holding that the fourth section of the Act of Congress aforesaid is applicable to the facts appearing from the alternative writ, and the return thereto, and authorized and justified the granting of the relief prayed for.

VIII.

The Court erred in holding the bridge erected and maintained by said Railroad Company, over the Missouri River, at Omaha, a part of the Railroad of said Company, and that it is a duty obligatory upon said Union Pacific Railroad Company to erect and maintain and operate same.

IX.

The Court erred in holding that the Act of Congress, approved July 1, 1862, entitled "An Act, to aid in the construction of a Railroad and Telegraph line, from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same, for postal, military and other purposes," and the Acts amendatory thereof, empowered said

Railroad Companies to build, maintain and operate a Railroad within the boundaries and jurisdiction of the State of Iowa.

X.

The Court erred in allowing an amendment of the alternative writ.

XI.

The Court erred in awarding the peremptory writ, and ordering the issue of the same.

Of the above assignment, the 2, 4, 5, 6, 7, 8, 9 and 11, are especially insisted upon here.

The substantial questions then presented for solution are.

I.

At what place was the Eastern terminus or initial point of the Omaha branch of the Union Pacific Railroad, established by act of Congress, and executive orders, made by authority thereof.

II.

Is the Railroad Bridge of the Union Pacific Railroad Company, over and across the Missouri River, at Omaha, and the Railroad track laid thereon, a part of that Company's Railroad required by law to be built and operated as a portion thereof.

III.

Third, can a private citizen, on his own motion, without the assent or direction of the Attorney General of the United States, or the United States District Attorney, for the District of Iowa, become a relator on behalf of the United States, under the Act, authorizing the proceeding instituted in this case.

IV.

Is the Railroad Company empowered by law to charge and collect tolls upon freight, passengers and cars transport-

ed over its bridge, or must it charge and collect only such a proportion of its through rate from its Eastern to its Western terminus, as the length of its bridge bears to the entire length of the road.

V.

Does the obligation to "operate and run said roads and telegraph * * as one continuous line," require their operation by *continuous trains*.

The Court below, resolved, the first, second, third and fifth questions against the Company, the fourth in its favor.

Laws and Executive Orders.

The Union Pacific Railroad Company was created by Act of Congress of July 1, 1862, 12 Statutes, P. 469. This Act was amended by Act of July 2, 1864, 13 Statutes, P. 356. The material portion of said Acts, and other Acts of Congress and executive orders bearing directly on the questions in controversy, are as follows:

Act of July 1, 1862, Sec. 1.

* * * * And the said corporation, is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous Railroad and Telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude West from Greenwich, between the south margin of the valley of the Platte River, in the Territory of Nebraska, to the Western boundary of Nevada Territory. * * * *

Act of July 1, 1862, Sec. 14.

That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the Western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the

lines of said Company, at some point on the one hundredth meridian of longitude aforesaid. * * * *

Executive Order of November 17, 1863.

EXECUTIVE MANSION,
WASHINGTON, November 17, 1863.

In pursuance of the fourteenth Section of the Act of Congress, entitled "An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes, approved July 1, 1862, I, Abraham Lincoln, President of the United States, do hereby fix so much of the western boundary of the State of Iowa *as lies between the North and South boundaries of the United States Township, within which the City of Omaha is situated,* as the point *from* which the line of railroad and telegraph in that section mentioned shall be constructed.

ABRAHAM LINCOLN.

Executive Order of March 7, 1864.

In pursuance of the provisions of section 14 of the Act of Congress, entitled "An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, authorizing and directing the President of the United States to fix the point *on the western boundary of the State of Iowa, from* which the Union Pacific Railroad Company is by said section authorized and required to construct a single line of railroad and telegraph upon the most direct and practicable route, subject to the approval of the President of the United States, so as to form connection with the lines of said Company at some point on the one-hundredth meridian of longitude, in said section named. I, Abraham Lincoln, President of the United States, do, upon the application of the said Company, designate and establish such first above-named point *on the western boundary of the State of Iowa, East of and opposite to the East line of section* 10, *in township* 15 *north of range* 13 *East, of the sixth principal meridian in the Territory of Nebraska.*

Done at the City of Washington, this seventh day of March, in the year of our Lord, One Thousand Eight Hundred and Sixty-four.

ABRAHAM LINCOLN.

Act of Congress Fixing the Western Boundary of the State of Iowa; Statute Vol. 9, P. 52.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following shall be,

and they are hereby declared to be the boundaries of the State of Iowa, in lieu of those prescribed by the second section of the Act of the third of March, Eighteen Hundred and Forty-five, entitled "An Act for the admission of the States of Iowa and Florida into the Union," viz: Beginning in the middle of the main channel of the Mississippi River, at a point due East of the middle of the mouth of the main channel of the Des Moines River, to a point on said river where the northern boundary line of the State of Missouri, as established by the constitution of that State, adopted June twelfth, Eighteen Hundred and Twenty, crosses the middle of the main channel of the said Des Moines River; thence Westwardly along the said Northern boundary line of the State of Missouri, as established at the time aforesaid, until an extension of said line intersect *the middle of the main channel of the Missouri River*; *thence up the middle of the main channel of the said Missouri River to a point opposite the middle of the main channel of the Big Sioux River*, according to the Nicollet's map; thence up the main channel of the said Big Sioux River, according to said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence East along said parallel of forty-three degrees and thirty minutes, until said parallel intersect the middle of the main channel of said Mississippi River to the place of beginning.

Act of July 2, 1864, Sec. 9.

That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River and other rivers which its road may pass in its course, and authority is hereby given said corporation to construct bridges over said Missouri River and all other rivers for the convenience of said road. * * *

Act of February 24, 1871.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the more perfect connection of any Railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of

Congress ; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said Company may levy and collect tolls and charges for the use of the same ; and for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the Act entitled " An Act to authorize the construction of certain bridges, and to establish them as post roads," approved July Twenty-five, Eighteen Hundred and Sixty-six, so far as the same is applicable thereto ; AND PROVIDED. That nothing in this act shall be so construed as to change the Eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws : PROVIDED ALSO, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: PROVIDED, That if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw.

Approved, February 24, 1871.

Act of July 1, 1862, Sec. 12.

* * * * The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that when completed, cars can be run *from the Missouri River to the Pacific Coast*; * the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one connected continuous line.

Act of July 2, 1864, Sec. 15.

That the several companies authorized to construct the aforesaid roads, are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. * * * *

Recurring now to the cardinal questions whose solution determines this controversy, and postponing for the present the consideration of the objections to the form of the proceeding in this action.

I.

At what point was the Eastern terminus of the Omaha branch of the Union Pacific Railroad established by act of Congress and executive orders made by authority thereof?

In passing upon this question the Court below used the following language:

"If the road which the respondent is bound to operate has its terminus on the western shore of the Missouri river, as its counsel have contended; in other words, if, under the acts of Congress, applicable to the respondent, it was not authorized to build the road it is required to operate, to the Iowa shore of the river, it may be conceded that the result would be that the relators would not be entitled to the writ they ask."

The scheme of the Pacific Railroads as shown by an examination of the Acts of Congress, was this. One federal corporation, with power to build a main trunk from the 100th meridian Westward to the Eastern boundary of California, and two branches extending *from the Missouri River* westward to a connection with the main trunk on the one hundredth meridian, to be built by the same federal corporation. A main line extending from the Western terminus of the Union Pacific, on the Eastern boundary of California to the navigable waters of the Sacramento River, or the Pacific Coast, to be built by the Central Pacific Railroad Company, a State corporation, created by the laws of California. A branch extending *from the Missouri River* at the mouth of the Kansas River, on the south side thereof, to a junction with the Union Pacific on the one hundredth meridian, to be built by a Kansas corporation, created by the State of Kansas, first called the Leavenworth, Pawnee & Western Railroad Company, but now known as the Kansas Pacific. *I call particular attention to the fact, that in this scheme Congress has not, in express language, provided for the construction*

by this federal corporation of any railroad whatever, within the geographical limits of a State.

Apart from the 14th section of the Act of July 1, 1862, only one event or act was necessary to permanently establish the point on the Western boundary of the State of Iowa *from* which the Omaha branch should be built. That act or event was to be performed by the President. The Eastern terminus was to be "fixed" by him. Every essential therefore to the establishment of such terminus had transpired and was consummated before the passage of the amendatory Act of July 2, 1864, the ninth section of which grants express power to span the Missouri River at Omaha, with a Railroad Bridge. The first executive order of the President is dated Nov. 17, 1863; the second, March 7, 1864; both prior to the Act granting express power to bridge. The inquiry then narrows itself down to this. Where under the Act of July 1, 1862, and executive orders, was such Eastern terminus "fixed?" If not on the Iowa shore, has it been since changed or removed to the Iowa shore.

The language used by section 14, of the Act of July, 1, 1862, in fixing the line *from* which the road was to be built; "the western boundary of the State of Iowa," is not a loose popular expression. It is singularly exact, corresponds completely with the language used by Congress in the Act defining the "boundaries of the State of Iowa, and was evidently chosen to convey a meaning which could not be misapprehended, misconstrued or reasoned away. The President in his executive orders was careful to use the identical expression. In his first order he fixes "so much of the Western boundary of the State of Iowa, as lies between the North and South boundaries of the United States Township, within which the city of Omaha is situated "as the point *from* which" the line of road is to be built. This fixed the line *from* which the road should be built, but leaves the exact *point* in uncertainty to the extent of six miles North and South, or up and down the river. The second order reduced this uncertainty to one mile North and South, "East of and opposite to section 10" in the same township. Reference to the map hereto attached will show

that section 10 is a fractional section, whose "east line" is the Missouri River, and that the actual terminus or point of departure of the road, as afterwards located and built, with the approval of the United States, was the North line of section 10, at the point where it touches the West or Nebraska shore of the Missouri River. From this point the road was located and its location approved by the President. From this point it was built and accepted by the United States, and its bond subsidy delivered and land grant adjusted and administered.

To contend that Congress and the President intended by the language used to fix the terminus on the Iowa shore, is to contend that the constitutional power exists in Congress to charter a corporation, with authority to build and operate a railroad within the limits of a State, and that it intended to exercise that power in the Act under consideration.

Apart from the language of the Act itself, to be considered hereafter, the following seem strong reasons, showing that Congress not only did not undertake to exercise such a power, but on the contrary intentionally and carefully avoided it.

First, The debates in Congress on the bill show that such a power was expressly disclaimed and negatived, and that amendments were adopted in the last stages of the bill to adjust it to this idea. The bill, as originally reported, fixed the Eastern terminus of the main trunk in Kansas (then a State), and the Eastern terminus of the Omaha branch, in the interior of Iowa. Because the objection was made, that Congress lacked power to authorize the Union Pacific Company to build its road within a state, the bill was modified so as to fix the Eastern terminus of the main trunk in the territory of Nebraska, and that of the Omaha branch on the Western "boundary" of Iowa. In support of this amendment, Mr. Thaddeus Stevens said in the House: "I have already stated the reason why I cannot go for a bill which authorizes this Company to make a road through the states, but if companies already organized in the states shall be authorized to build the parts of the lines within those states, I shall have no ob-

jection to it. My amendment is intended to strike from the bill everything that gives authority to this Company to build the road through the states, on this and the other side of the Rocky Mountains." (Con. Globe, 37 Congress, Pt. 2, P. 1890.) On the same subject in the Senate, Mr. Trumbull said: "I suppose it was intended to commence this road beyond the limits of any State. * * * The bill as it comes to us is for building a railroad *between* the states this side of the Rocky Mountains, and the State of California on the other side of the Mountains, through the territories of the United States." (Con. Globe, Pt. 3, P. 2654, 37 Sess.) On the same subject, (Pt. 3, 2783.) Mr. Harlan said. "As the bill now stands the Union Pacific Railroad Company is obligated to build a road from some point *opposite to Iowa*, to the one hundredth meridian, on the terms and conditions on which they build the trunk lines."

Second. The cardinal theory of the Act in respect to constitutional power, was that the exercise of the federal power was clear and unquestioned only in the territory. It carefully committed to the federal corporation the power and duty of building through the territories, and turned over the construction of all necessary connections extending into or through states to the state corporations.

Third. In authorizing the Hannibal & St. Joseph Railroad Company (a Missouri corporation), to connect its road with the Pacific system, it makes the *consent of the State of Kansas* a condition precedent to extending its road through Kansas.

It is said these considerations have little weight against the fact that Congress has undertaken to exercise this questionable power in the case of the Texas Pacific Railroad Company, chartered March 3, 1871. This is the only instance in which Congress has seemed to exercise the power in question. The construction of the Northern Pacific through Minnesota, (U. S. S. Vol. 13, P. 372), is made conditional upon the consent of that State. But it is submitted that the action referred to, taken nine years later, shows no light on

the intent and purpose of Congress which enacted this legislation.

The question we are dealing with, is, what was the accepted and received congressional opinion in 1862, and what light does it throw upon the language of the original Act chartering the Union Pacific Railroad Company, claimed by the defendant to have an import, involving the exercise of momentous powers, not expressed in its language. * If the words used need interpretation from extrinsic sources, the light reflected upon them by surrounding circumstances and opinion, is clear and strong against the latitudinarian construction contended for by defendant.

The existence of the power in Congress to charter a corporation with power to build a railroad within the jurisdiction of a State would seem to be negatived by the following cases and the ground on which they are decided.

Gibbons vs. Ogden, 9 Wheaton, 1.
United States vs. Combs 12, Pet. 72.
Cooley vs. Board of Wardens, 12 How., 299.
Reading Railroad Co., vs. Prim. 15 Wallace, 232, 284.
The Passaic Bridges, 3 Wallace, 782.
Gilman vs. Philadelphia, 3 Wolw., 725.

And this is generally true of the power to authorize the building of bridges and establishing ferries.

Conway vs. Taylers, Exrs. 1, Bl. 604.
United States vs. Munn, Newb. 241.
United States vs. Robe, Newb. 256.
Gillman vs. Philadelphia, 3 Wall, 725.

The latter case uses this significant language: "The National Government possesses no power but such as have been delegated to it. The States have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal constitution. It has not been taken from the States. It must reside somewhere. They had it before the constitution was adopted and they have it still."

If the power exists in Congress to authorize the building

of railroad or railroad bridge across the navigable waters of the Missouri river, no argument is necessary to show that it could only be conferred by express grant in appropriate words.

The Court below say: "If it be granted that Congress, by the use of the words "point on the western boundary of the state of Iowa," as descriptive of the "point of commencement" of the "Iowa branch," meant to refer to the legal boundary of the state as declared in 1846, (9 statutes at large 52), the views of counsel would be sound. And if there is nothing to show that Congress meant some other than the legal boundary, there would be a strong presumption that the legal boundary was the one here intended."

The Court then proceeds to reason away the word "boundary," on the assumption that "Congress had no question of Territorial jurisdiction before it, and hence its language was not used with reference thereto.

I have already shown from the structure of the scheme of the Pacific Railroads, the action of Congress and special provisions of the charter, that Congress intended to keep *outside* the boundaries of the States. Does the language of the Act of July 1, 1862, accomplish that purpose? It is beyond dispute that Congress *did* have before it a question of Territorial jurisdiction, and that protracted debate was consumed in both houses, in the work of adjusting the bill to the accepted opinion of Congress on the question of jurisdiction. So that in the language of Mr. Trumbull, it should provide for "building a railroad *between* the States" on either side of the Rocky Mountains, or that of Mr. Harlan "*from some point opposite to Iowa*, to the one-hundredth meridian." The words "western boundary of the State of Iowa," were used because the discussion had developed the necessity of exactness in fixing the point of commencement and the Company was empowered to build *from* that point because there was a settled and fixed purpose not to attempt to confer authority to build east of it.

This view is sustained and fortified by the following provisions of the act.

First the preamble, "An Act to aid in the construction of a railroad and telegraph line *from* the Missouri River to the Pacific Ocean." * * * It is conceded that the Act contained no express power to build a bridge, only a railroad. And this for the obvious reason that the railroad was to be built westward *from* and not eastward across the Missouri River.

Section 9. "That the Leavenworth, Pawnee and Western Railroad Company of Kansas, are hereby authorized to construct a railroad and telegraph *from* the Missouri River. * * And in case the general route or line of road *from* the Missouri River to the Rocky Mountains. * *

Sec. 12. "The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that when completed, cars can be run *from* the Missouri River to the Pacific Coast."

Section 10 fixes the times within which the several roads shall be completed, and provides that in case either fail, the others may, jointly or separately continue the work. In case the Union Pacific fail, it declares that other Companies may do its work. The language in which this work is described becomes very material in arriving at the intent of Congress. In each case the road authorized to be built, is *to the Missouri River*, not across the river to Iowa, and in every case where a federal corporation or a corporation of a State other than that through which the road is to be built, is to build, it must be *with the consent* of the State in which the road is to be built. *

Sec. 17, after fixing the date in which the Companies shall complete the entire system of Pacific Roads, contains this proviso.

Provided, That if said roads are not completed so as to form a continuous line of railroad, ready for use, *from the Missouri River* to the navigable waters of the Sacramento River. in California, by the first day of July eighteen hundred and seventy-six, the whole or all of said railroads before mentioned and to be constructed under the provisions

of this Act, together with all the furniture, rolling-stock, machine-shops, lands. tenements, and hereditaments, and property of every kind and character, shall be forefeited to and be taken possession of by the United States.

This section is undoubtedly in its effect upon both the Companies and Government, one of the most far-reaching in the Act. It fixes a time for the completion of the whole road, and denounces the penalty of a complete forfeiture, in case of failure to do what? To build and run a railroad to the Iowa shore of the Missouri River? No. But "if said roads are not completed so as to form a continuous line of railroad ready for use *from the Missouri River* to the navigable waters of the Sacramento River," the forfeiture is to attach. If Congress intended to authorize and require the Company to build its railroad across the Missouri River, what fatuity so framed this clause of forfeiture as to leave the United States remediless against a failure to perform the costly work of throwing a bridge over the Missouri River? It is beyond refutation that if the road had been built wholly under this Act, this forfeiture could not have attached upon failure to build east of the Nebraska Shore, where the President planted the flag staff, marked initial point. But the initial point was fixed under this Act, before the passage of any subsequent law, and it seems plain that the extent of the forfeiture was intended to be commensurate with the duty and obligation of the Company in respect to the work they are authorized to do. The Court below lays stress upon the consideration that it could not have been the intention to omit provision for so expensive a work as the Missouri River Bridge, and thus leave a "hiatus" between the Union Pacific and the Iowa roads. Why then omit it from this clause of forfeiture? But upon this point it should be borne in mind, that at this time no Iowa road was finished within two hundred miles of the Missouri River, and that none was afterwards completed until nearly six years after the passage of the Act of July 1, 1862.

As evidence of where President Lincoln thought he had "fixed" the Eastern terminus, the following from his annual

message of December 7, 1864, would seem to be conclusive.

"The route of the main line of the road has been definitely located for one hundred miles Westward from *the initial point at Omaha City, Nebraska.*"

This message was delivered about thirty days after he had approved the map of final location. It is the last utterance of President Lincoln on the subject, and is absolutely conclusive of his acts and intentions in performing the duty imposed on him by the act of Cngress.

The Act of July 2, 1864, contains the following significant provisions, all pointing unmistakably in the same direction.

In the seventeenth line of section 9 is found this language: "Any Company authorized by this act to construct its road and telegraph line *from the Missouri River* to the initial point aforesaid." * *

The last clause of section 12 provides that no bonds or lands shall be given the Company for the construction of any road west of the one-hundredth meridian and east of the Rocky Mountains "until said road shall be completed *from or near Omaha*, on the Missouri River," to said one-hundredth meridian.

Section 17 speaks of the "Iowa branch of the Union Pacific Railroad from *Omaha.*"

Section 18 refers to "the main trunk of the Union Pacific Railroad, or that part of it which runs *from Omaha* to the said one-hundredth meridian."

Section 2 of the Act of July 6, 1866, (Stat. at large, vol. 14, p. 79,) uses this language: "That the Union Pacific Railroad Company * * * * are hereby authorized to locate, construct and continue their road *from Omaha in Nebraska*," westward, without reference to the initial point on the one-hundredth meridian.

All the foregoing are clear and explicit recognitions by Congress of the correctness of the construction which assigns the eastern terminus of the road to Omaha, or the west bank of the Missouri River.

All these provisions are in consonance and harmony with the title of the Act, the clear and explicit language of Congress, the repeated action of the President and the Departments, the uniform

action of the Company, under the direction, assent, and approval of the Government, and add great weight to the considerations already urged. Not one syllable in the act can be shown either by express language or reasonable implication, authorizing or requiring the construction or operation of a single foot of railroad *east of* or *across* the Missouri River, only westward *from* it and eastward *to* it.

If the language used by Congress and the President was of doubtful interpretation, (and so far from considering it ambiguous, we regard it as unusually exact and certain) the contemporaneous construction placed upon it by officers of the Government and the Company, is entitled to great weight—especially where large expenditures have been made and pecuniary interests have become fixed on the faith of such a construction.

In Chicago vs. Shelden (9 Wallace, 54,) Mr. Justice Nelson says: "What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence."

Applying this principle, I cite the following as conclusive proof of the practical construction placed upon the charter of the Union Pacific Railroad Company by the officers and agents, both of the Government and Company, charged with carrying the same into execution.

On the 19th May, 1865, Secretary of the Interior, Harlan, made a communication to the President in which occurs the following:

"The permanent location of said road (the Union Pacific) for one hundred miles *West of Omaha*, was approved by President Lincoln on the 4th of November, 1864, in the exercise of the power conferred by the Fourteenth Section of the Act of Congress, approved July 1, 1862."

(Report of Sec. Interior and accompanying documents, 1864 and 1865, page 896).

On the 20th April, 1865, (same report, page 879,) Secretary of the Interior, Usher, made a communication to the President in which occurs the following:

"I have the honor to report that on the 4th day of November last,

your predecessor *approved the location of the Union Pacific Railroad for one hundred miles West from Omaha, Nebraska*, according to the accompanying map, certified by the President of said Railroad Company on the 19th of October, 1864, upon which the location was marked in rep ink."

The map referred to is the one hereto attached.

On the 30th of Oetober, 1863, T. C. Durant, Vice-President and General Manager, made a report to the Board of Directors in which, referring to the decision of the President, fixing the eastern terminus, he says (page 23):

"This decision, rendered on the 17th of November last, established the eastern initial point of the road *within the township within which is the City of Omaha*, the Capitol of the Territory of Nebraska." (40th Con. 2 S. Ex., Doc. No. 252).

The above corresponds with the terms of the original order of the President, which he says was delivered to the Vice-President of the Company, November 17, 1863.

The communication of the Engineer in charge, P. A. Dey, (page 33), speaking of the survey of the line on which the road is now built, says :

"The second line starts from the *north line of the Congressional township in which the City of Omaha is located.*"

On the 27th January, 1864, the same Engineer made a further communication to the Vice-President, in which similar language occurs (page 36).

On the 2d of April, 1864, in a communication to the stockholders, President John A. Dix uses the following language (page 58).

"The eastern terminus of the road having been fixed by the President of the United States, *in the township of which the City of Omaha is a part*, directions were given to break ground on the 2d of December last. These directions were carried into execution, and the commencement of the work was inaugurated with appropriate ceremonies."

On the 4th of November, 1864, Secretary of the Interior, Usher, addressed the following letter to the Vice-President of said Company, (page 876).

DEPARTMENT OF THE INTERIOR,
November 4, 1864.

SIR:—Your letter of the 3d instant, together with the map of the Union Pacific Railroad, for one hundred miles west from Omaha, Ne-

braska, were submitted to the President to-day, and he has formally approved the location of the road *as indicated upon said map*, which will be retained on the files of this department as the basis for the adjustment of the corresponding grant of lands to the Company.

I am, sir, very respectfully your ob't serv't.

J. P. USHER, *Secretary.*

THOS. C. DURANT, Vice-Pres. U. P. R. R. Co., 13 William St., N. Y.

The map referred to is the one filed and approved November 4, 1864, by President Lincoln, and now in the General Land Office.

On the 12th of May, 1864, Gen. J. A. Dix, then President of said Company, in a letter to the President of the United States touching a change of location of a portion of the line between Omaha and the Elkhorn River, says, (page 895).

"In pursuance of the above provision (Sec. 14 of the Act of July 1, 1862), this Company, on the 19th of October, 1864, filed in the Department of the Interior a map showing the location of the first hundred miles of said road *west of Omaha*, which line or route was duly approved by the President of the United States."

On the 21st of December, 1864, Silas Seymour, Consulting Engineer of the Union Pacific Railroad Company, made to its Vice-President a report in which occurs the following:

"Inasmuch as I have recommended a change in the location of a portion of the line of the Union Pacific Railroad, between Omaha City, *the point on the Missouri River fixed by the President of the United States for its eastern terminus*, I deem it proper," etc., etc.

On the 24th of December, the same officer addressed to a large number of distinguished engineers a letter in which is found the following paragraph, (page 404):

"The eastern terminus of the Union Pacific Railroad has been fixed by the President of the United States at Omaha City, Nebraska."

On the 20th of July, 1865, Hon. Springer Harbaugh, Government Director, under instructions, made a report to Secretary Harlan, in which is found the following, (page 950):

"We commenced our reconnoisance at Omaha City, on the Missouri River, *that being the eastern terminus of the road as fixed by the President of the United States.*"

And in a further letter to the same officer he says, (page 954):

"*That point* (the eastern terminus) *was definitely settled by President Lincoln at Omaha City, on the Missouri River.* The Company designated the general route and filed a map for the first one hundred miles in the Department of the Interior."

In an official report made to Secretary Usher by Hon. Jesse Williams, Government Director, November 15, 1864, is found the following, (page 876).

"The arrangements for the eastern terminus of the road *on the west bank of the Missouri River, at Omaha,* appear judicious, affording every facility for handling freight to any amount. Ample grounds have been promised the Company, covering the river front for one and a half miles, the conveyance of which has not yet been fully perfected."

May 17, 1866, Hon. Springer Harbaugh Government Director, made a report to Secretary Harlan, in which occurs the following, (Ex. Doc. No. 2, Special Session 1867, page 5):

"On reaching the initial point at Omaha," etc., etc. Accompanying the same report is a map showing the first hundred miles west of Omaha, as approved by President Lincoln, November 4, 1864, showing the initial point or terminus on the north boundary of Sec. 10, Township 15 N., R. 13 East, 6th P. M., (being the township in which Omaha is situated), and on the west bank of the Missouri River, in Nebraska.

Aug. 30, 1866, all government directors, Springer, Harbaugh, T. J. Carter, Charles T. Sherman, J. L. Williams and George Ashman, in a communication to the Secretary of the Interior, say, (page 10):

"The second report, embracing the results of Mr. Harbaugh's observations on the line of the road, contains valuable suggestions in regard to the work at and near Omaha, its initial point."

Sept. 14, 1866, the same officers, except Mr. Harbaugh, in a report to Hon. O. H. Browning, Secretary of the Interior, say, (page 11):

"At the terminus of the line, at Omaha, have been erected well arranged machine shops and engine houses, of brick, sufficient for the

wants of the road, with necessary tracks for the present business of the road, and can be extended as required upon the ample depot ground at the terminus of the line."

On the 30th of January, 1867, Hon. T. J. Carter Government Director, resident at Springfield, Illinois, by request of Secretary of the Interior, Browning, made a report in which occurs the following, (page 27):

"The initial point on the western boundary of the State of Iowa, was informally fixed by the President of the United States, November 17, 1863, and March 7, 1864, designated and established upon Sec. 10, Township 15 North, Range 13 East, sixth Principal Meridian, in the Territory of Nebraska. Therefore the Union Pacific Railroad commences at Omaha, Nebraska, thence to the 100th Meridian of longitude, in the Platte Valley, and is thence the main trunk road to the western boundary of Nevada Territory or California line."

From all the foregoing the conclusion is irresistible, that President Lincoln intended to fix the terminus on the west bank of the river, and believed he had so established it beyond the possibility of change—that Secretaries Usher, Harlan, and Browning, treated and recognized it as having been so established—that all the officers of the Company, including the government directors, for eight years, in all their official acts and declarations, treated the road as having its lawful eastern terminus in Omaha.

The Court below says, if the Nebraska shore was meant, why is Iowa mentioned at all. An equally pertinent inquiry would be, if the Iowa shore is meant, why is Nebraska mentioned at all. Council Bluffs was an older and better known city than Omaha, and the surveys in Western Iowa had been long before completed. It was as easy to fix the initial point by reference to Iowa as Nebraska monuments. Why not use them? And why not say Iowa shore? And why not mark the initial point on the Iowa, instead of the Nebraska shore?

The Court also says, if it was not the intention to authorize a bridge at Omaha, by the Act of 1862, why require the northern branch to be built from Sioux City, a place wholly in Iowa? This question may well be answered by another, viz., why did the ninth section of the Act of 1864, authorize

the construction of *bridges*, plural, over the Missouri. Only two branches touched the Missouri River, one at Omaha, the other at Sioux City, and the express power to bridge was made applicable to both. What necessity or reason in this, in either case, if the power had already been granted under the general grant of authority to build a railroad?

If, as the Court say, the bridge over the Missouri was authorized and *required* to be built as a part of the railroad, then certainly it would be, and constitute a part of the first hundred miles of its route. Why omit it then, from the route as filed and approved? Why not hold the Company to the construction of the bridge, as a part of the first section of forty miles of its route? And why deliver the bond subsidy and patent the lands, before it was finished? There is, and can be but one explanation. The whole theory that the road commenced on the Iowa shore, was an afterthought, struck out after the bridge was built, by some ingenious brain, under the pressure of low-priced real estate, on the "Iowa shore." At that time the construction of a railroad bridge over the Missouri River, was regarded as an experiment, only to be accomplished, if at all, at fabulous expense. Did Congress at the outset intend to lay upon the Company the enormous burden of the expenditure of two or three millions of dollars, to inaugurate merely the construction of the road, by bridging the Missouri River, in order to commence the railroad on the Iowa shore. If so, why did it afterwards, July 2, 1864, grant express power to build the same bridge, and, later still, Feb. 24, 1874, and after the railroad was completed and the entire bond subsidy had been secured, empower the Company to mortgage the structure to the extent of two and a half millions, to secure money for its construction?

I submit that I have shown with a certainty, almost amounting to demonstration, that the Eastern terminus of the Union Pacific Railroad, was fixed by Congress and the President, wholly under the act of July 1, 1862, and that Congress, with a careful study and exact comprehension of the language used, provided for a railroad between the State

of Iowa on the East and California on the West. That the President interpreted and executed this legislation, by planting the initial point on the Nebraska shore of the Missouri River, Nebraska being then a Territory, and approving the route Westward therefrom. Thus the Eastern terminus became, and was fixed in Nebraska and not in Iowa.

II.

Is the bridge in question, part and parcel of the Union Pacific Railroad, to be operated and treated as such; with the rights, duties and obligations of a railroad, rather than a bridge.

There would seem to be no better evidence of the intention of Congress, not to grant the power to bridge the Missouri in the Act of 1862, than the fact that this authority was given in express words in the Act of 1864. It amounts to a legislative declaration that the power was not granted by the first Act. What was the purpose of granting this additional power, and following it up by subsequent legislation, designed to enable the Company to raise the means of executing it. This purpose is declared in both the Acts referred to. Section 9, Act 1864, provides "that to enable any one of said corporations to make *convenient and necessary connections with other roads*, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River, * * * and authority is hereby given said corporation to construct *bridges* over said Missouri River. * * The Act of Feb. 24, 1871, which furnished the means of construction, also defines the purpose, object and use of the structure, viz., "for the more perfect connection of any railroads that are, or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska." The bridge to be built then was to enable the Union Pacific and other roads terminating on the Nebraska shore, and roads terminating on the Iowa shore, to maintain "a more perfect connection" with each other, and roads to be built to either side of the river in the future. And to put its character beyond question, the Act of February 24, 1871, declared "for the use and

protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed and limited" by the provisions of the Act of July 25, 1866. This Act, (14 Statute, P. 244), authorizes the construction and maintenance of seven bridges over the Mississippi, and two over the Missouri River; all by State corporations, and when built, "all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation to be made to the owners of said bridge." * * An examination of subsequent legislation on this subject, will show that the construction of Railroad Bridges has almost uniformly been undertaken by bridge Companies deriving their corporate powers from State Legislation, and I think the present the only instance in which they have been granted to a federal corporation. I doubt whether a single instance can be cited in which it has been claimed that these Companies are required to run trains over their bridges. Yet the general provisions "governing, enforcing and limiting the use and protection of said bridges," are the same as are applicable to the bridge in question. Why then subject it to different obligations? To hold it a part of the road, withdraws it from the operation of this Act, subjects it to the private use of the Company, excludes the trains and cars of other roads therefrom, gives it the power to destroy the better connections it was created to preserve and inflicts upon all other Railroad Companies and their business, the hiatus referred to by the Court below.

The following are strong reasons why the bridge should not be held a part of the railroad.

First. Section 9, Act July 2, 1864, containing a clear and express grant of a franchise to construct and establish bridges and ferries across the Missouri, does not empower the Company to "build, maintain and operate," any railroad additional to that authorized by the Act of July 1, 1862.

Second. The bridge is not an extension of the road, and its eastern end is not "east of and opposite to Sec. 10," but about two miles south of that point. It is in no place less than one mile

distant from the line of the railroad as located, built and accepted by the United States. The right of way and approaches thereto, were not acquired as a part of the line of the road, but as a part of the bridge and approaches thereto. If the bridge is an extension of the railroad, and the initial point is in Iowa, east of and opposite to Section 10, the bridge should have been constructed to that point. If established there, as claimed, when and how was the terminus changed? When the President fixed the eastern terminus, his power was exhausted. What subsequent legislation changed it? I challenge the production of any enactment of Congress, or any form of authority, either changing the terminus as fixed by President Lincoln, or the location of the road as originally approved by him. If the Company is bound to run its trains to the terminus, and it is established at the point contended for by defendants, the mandamus could only lie to compel the operation of the road to a point nearly three miles north of the bridge in controversy.

Third. It is nowhere made obligatory upon the Company to build the bridge under its franchise. It could have wholly declined and failed to do so without forfeiture of its franchises. Such forfeiture is only denounced in case of failure to complete its road by July 1, 1875, so as to form a "continuous line of railroad *from the Missouri River* to the navigable waters of the Sacramento River." Suppose the Company had elected to "establish a ferry," instead of "constructing a bridge," would such ferry have been an extension of its road? Would it have violated the charter if the Company had declined to "construct a bridge," or "establish a ferry," and confined its business wholly to the Nebraska side of the river? These are questions which answer themselves, and show beyond controversy that the franchise to build a bridge or establish a ferry, granted a Railroad Company, does not constitute such bridge or ferry a part of its railroad, any more than a franchise to erect a rolling-mill or work a coal-mine would constitute such mill or mine an extension of its railroad.

Fourth. The same act granting the franchise to bridge the Missouri River, repeatedly recognizes the construction that the road commences at Omaha, in Nebraska, in express and distinct language.

In the seventeenth line of Section 9 is found this language:

"Any Company authorized by this act to construct its road and telegraph line *from the Missouri River* to the initial point aforesaid." * *

The last clause of Section 12 provides that no bonds or lands shall be given the Company for the construction of any road west of the one-hundredth meridian and east of the Rocky Mountains "until said road shall be completed *from or near Omaha*, on the Missouri River," to said one-hundredth meridian.

Section 17 speaks of the "Iowa branch of the Union Pacific Railroad from *Omaha*."

Section 18 refers to "the main trunk of the Union Pacific Railroad, or that part of it which runs *from Omaha* to the said one-hundredth meridian."

Section 2 of the Act of July 3, 1866, (Stat. at Large, vol. 14, p. 79,) uses this language: "That the Union Pacific Railroad Company * * * are hereby authorized to locate, construct, and continue their road *from Omaha, in Nebraska*, westward, without reference to the initial point on the one-hundredth meridian."

Fifth. The Act of February 24, 1871, adopts and recognizes the construction contended for, viz., that the bridge is a separate and distinct property—built under a separate franchise, and severed from the road. Any other view renders this Act entirely superfluous, and imputes to Congress participation in a fraud of gigantic dimensions. If the bridge is a part of the railroad, what necessity of the Act of February 24, 1871, to enable the Company to mortgage it? The power to execute a mortgage on the road had been given in express terms by the same Act which granted the franchise to bridge. Section 10 of that Act says: "the Union Pacific Railroad Company * * may * * issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the bonds of the United States." And under this clause the first mortgage attached to the return of respondent, bearng date long before the passage of this Act, had been issued and negotiated, and the proceeds applied in construction of the road. If, therefore, the bridge was a part of the Company's railroad line, as ruled by the Court below, what necessity of a new power to mortgage.

But a graver result than this is apparent. Upon the theory of the defendant in error, the bridge, as a part of the road, was already encumbered by the first mortgage to the amount of twenty-seven millions of dollars. The Government subsidy was a second lien to a like amount, which was to be swelled and multiplied by the accumulated interest, paid by the Government in excess of receipts on the subsidy bonds, already amounting to about six millions, with twenty years to run. Encumbered to this amount—fifty-four millions—with interest accumulations on Government subsidy bonds in twenty years not susceptible of computation, but probably twenty millions—Congress undertook, it is insisted, to segregate three miles of the east end of the road, and subject it to a new mortgage of two and a half millions, and send the Company out, armed with its endorsement, to negotiate it as a first mortgage. These bridge bonds were issued, negotiated and are held as a first lien. It is only since they were sold, and the proceeds applied in building the bridge, and after its completion, that the claim has been put forward that they are to be postponed to the first mortgage and subsidy bonds. If the construction contended for by defendant in error is correct, then it follows that this bridge mortgage, authorized by special act, and put before the world as a first lien on the bridge, is a third lien on three miles of the road, the whole thereof being encumbered by a prior lien of not less than sixty millions. This was not the intention of Congress. It treated the bridge as separate from the road, erected under a distinct franchise, authorized it to be mortgaged to provide the means for its construction, and the Company negotiated the bonds as secured by a first lien on the bridge, and thus raised the money out of which the bridge was built. Whatever others may do, good faith and fair dealing require that the Government of the United States should adhere to that construction of the law which gave to these securities their value, and induced their successful negotiation. A construction of the law, so destructive to private interests and investments, made on the faith of the legislation of Congress, should never be adopted, unless demanded by the highest necessity, and upheld by imperative sanction of the law.

But it is said, the priority of these several liens on the bridge is not now in question, and it will be time enough to discuss that question when reached. It is true that the holders of the first

mortgage bonds and bridge bonds, are not before the Court, but both instruments are before the Court, and their character and effect fully shown. If the franchise to build the railroad authorized the construction of the bridge, then a mortgage of that franchise and railroad and appurtenances, covered the bridge. The like is true of the subsidy bonds granted by the Government. The judgment of the Court then, that the bridge is a part of the road, is a judgment that both the first mortgage bonds and Government subsidy are liens prior to the bridge bonds. The principle contended for just as effectually destroys their value as if the owners were a party to this action. The bridge bondholders, for all practical purposes, are substantial parties to this suit. The decision of the Court below has been accepted by the public as a repudiation of those securities, and its affirmance here will be held a final and effectual declaration of their status and value.

I think it established, therefore, that the Missouri River Bridge of the Union Pacific Railroad Company, is not a part of its railroad; that the franchise to build it was granted after the terminus had been fixed on the Nebraska bank of the Missouri River; that the Company are not legally bound to build it, and that being built, they are under no legal obligation to operate it as a railroad, but that Congress intended it to serve the use and purpose of a bridge for the passage and connection of all trains of all railroads terminating on either bank of the Missouri, without the right and power of subjecting it to its own exclusive use, and excluding therefrom all trains and cars of all other roads; that it is not subject to the lien of the first mortgage bonds, or Government subsidy, but that the bridge bonds are a first lien thereon.

III.

Can the relators maintain this action?

While the writ of mandamus was originally a prerogative writ, only to be set in motion by the Government, it must

now be conceded that it has ceased to possess that character. It was said by the Court in Commonwealth of Kentucky vs. Dawson, 24 Howard, 97: "It is equally well settled that a mandamus in modern practice, is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

It by no means, however, follows, that as in this case a private person may become a relator on behalf of the public to enforce a public right or require the performance of a public duty, without the intervention of the officers of the Government. Upon this point the authorities are undoubtedly in conflict. Before referring to them however, I wish to urge some considerations which seem to make this a new and special case, not to be decided on precedent merely, but upon its own peculiar circumstances.

First. For the first time in the history of the country, the Circuit Courts of the United States are clothed with original jurisdiction in cases of mandamus. Prior to the passage of the law under which this proceeding is brought, they were vested with no original jurisdiction in mandamus. but only exercised the power to issue the writ as an auxiliarly proceeding, and to enforce their judgment in cases arising from grants of original jurisdiction. A remarkable feature of the present grant of jurisdiction is, that it is not only an innovation and revolution in a branch of the law, as administered for nearly a hundred years, but the change is made as against a single party defendant. Of all the persons and corporations in the United States, the Union Pacific Railroad Company alone, is to be governed and controlled, and its business supervised and administered by the judges of the Circuit Courts through the machinery of a mandamus, issued as an

original and independent writ. So unusual and exceptional an act invites a careful scrutiny of its provisions before reaching the conclusion that Congress intended to furnish not only a new weapon to be wielded against a single one of all its subjects, persons and corporations, but likewise to place that weapon in the hands of whomsoever duty, malice or caprice, should impel to avail themselves of it.

Second. To carry out defendant's theory of the law, will subject the Company to infinite annoyance and oppression. The Judges of the Circuit Courts will find their calendars crowded with mandamus cases, and themselves transformed into Railroad Superintendents. The Judges of the Territorial Courts of Colorado, Wyoming and Utah, having and exercising Circuit and District jurisdiction, will find in this business congenial employment for that leisure which is the average lot of the Territorial judiciary. Every person feeling aggrieved, whether passenger, shipper, landowner, contractor, friendly or rival corporation, city or county, employee of every grade, and suitors of every character, abandoning the well worn paths of remedial justice, will flock to the dispensaries of this new panacea, speedy and effective in operation, which every body may ask and every body receive. Thus will be opened a placer richer than any hitherto uncovered, and thus will be afforded the edifying spectacle of a great national railroad, freighted with the commerce of two continents and superintended by a dozen Courts.

Third. Did Congress intend these results? I think its legislation, when carefully considered, gives a negative answer. As is well known, the fourth section of the Legislative Appropriation Act, of March 3, 1873, grew out of a Congressional investigation of the affairs of the Union Pacific Railroad Company, long protracted and carefully made, and finally reported to the House, with proposed legislation substantially in the form of the section in question. Its object was to afford a remedy for certain alleged irregularities or offenses which could not be reached under existing laws. These offenses and irregularities did not affect individuals.

The United States was the only sufferer, and under this legislation was to be the only suitor. It did not undertake to protect private rights, but to recover and restore the rights of the United States. The law was not framed in the interest of individuals, but the public. It does not provide for the vindication or preservation of private rights, only for the restoration and protection of the rights of the United States. It nowhere authorizes, in express language, private persons to institute suits of any character against the Company. So far as they are concerned, they are left precisely where the general body of the law has placed them. But it does in terms devolve the enforcement of the provisions of the Act upon the Attorney General. It authorizes a certain suit and prescribes the proceedings therein, and imposes upon the Attorney General the duty of commencing this suit and executing its purpose. It then denounces certain penalties upon certain offenses, the prosecution of all of which is the proper duty and office of the federal prosecuting officers. Then follows the clause in question. It seems to me, beyond doubt, when we consider the relation of the Railroad Company to the Federal Government; the fact that the main purpose of the law was to enforce and compel the performance of its duty to the Government, that the execution of the Act is made the duty and work of the Attorney General, the inconvenience, danger and annoyance, not to say injustice, of opening to general and indiscriminate prosecutions, by mandamus, every supposed breach of duty of the Company to individuals, that the proceeding can only be instituted at the instance of the Government. The whole Act was framed for the enforcement of the obligations of the Company to the United States, and the protection of the United States against its default in duty towards them. Why then go outside the Act, in search of relators and prosecutors, when the law officer of the Government is expressly charged with its enforcements.

Fourth. Apart from these considerations, growing out of the character and scope of the law, it is believed the prepon-

drance of authority in this country is against the right of private persons to become relators on behalf of the public. The rulings adverse to us, are those of New York, Indiana and Illinois.

People vs. Collins 19 Wend. 56.
Hamilton vs. State, 3 Ind., 452.
Pike County vs. State, 11 Ill., 202.

In the States of Pennsylvania, Massachusetts, California, Maine, Michigan and Texas, the rule is against this form of proceeding.

Washington vs. Pettus, 16 Pick, 105.
Rex vs. Merchants, Manufacturers' Co., 2 B. & Ald. 115.
Hooffner vs. Commonwealth, 28 Pa., 108.
People vs. Regents, 4, Mich., 98, 187.
Arbeny vs. Beams, 6 Texas, 457.
Langer vs. Commissioner, 25 Maine, 291.
People vs. Pacheo, 29 Cal., 212.

I think the better view of the law, especially in a case like this, where the rights and interest of the United States are specially placed in charge of Government Directors and the Secretary of the Interior, (Sec. 13, Act 1864), and the Attorney General, is that announced by the Court in People vs. Regents, 4 Mich., 103. After citing all the authorities holding a contrary rule the Court, says, "To these authorities, as we have said, are opposed the fact that the English Courts, which have moulded and formed the common law, transmitted it to us, and which governs both them and us, have not sustained a course of proceeding like this. The Courts of Maine, Massachusetts and Pennsylvania, have maintained a doctrine on this subject opposed to the New York and Illinois cases, and have held that to entitle an individual citizen to be heard as a relator on his own motion, he must show that he has some individual interest in the subject matter of complaint, which is not common to all the citizens of the State. And while we do not intend to say that a case may not arise in which this Court would allow an individual to file such a complaint, par-

ticularly if the Attorney General or Prosecuting Attorney were absent or refused to act, without good cause, we nevertheless express our conviction that this is a case in which the action of the Attorney General would have been proper and necessary."

The People vs. Pacheo, 29 Cal., 213, puts its refusal to allow a private person to become a relator on behalf of the public, upon the ground that by the laws of California the Attorney General is required to prosecute actions on behalf of the State. The United States District Attorney of each District, is required to "prosecute all civil actions in which the United States shall be concerned." This, in addition to the duty specially enjoined upon the Attorney General, by the Act itself, out of which this proceeding springs.

"The writ of mandamus is subject to the legal and equitable discretion of the Court, and ought not to be issued in cases of doubtful right."

Ins. Company vs. Wilson Hers., 8 Pet.. 303.
United States vs. President, 1 Cran., C. C., R.

The conclusion then, is, that the weight of authority is against the maintenance of this proceeding in its present form; that the law commits to the Attorney General, the execution of its provisions; that Congress, so far from intending to expose the road to assault from every quarter, imposed upon its own officers, exclusively, the duty of guarding the interests of the United States, and committed to the wise and safe discretion of their highest law officer, the exceptional power granted by the Act of invoking the writ of mandamus, as an original remedy, to compel the performance of duty by the Railroad Company.

IV.

Had the Company the right to charge and collect tolls upon the freight and passengers transported over its bridge?

This power is granted in such clear and unequivocal language by the Act of Feb. 24, 1871, that argument seems un-

necessary. And as the Court below held with us, basing its ruling upon the clear, explicit and unmistakable language of the Act, I shall waive argument on this point for the present.

V.

Does the obligation to "operate and run said roads and telegraph as one continuous line," require their operation by continuous trains?

The duty sought to be enforced in this case, is expressly stated in the writ to be that prescribed by the Fifteenth Section of the Act of 1864. No other obligation is alleged, and none established or sought to be established. A construction of this Section then, and an exposition of the duty imposed by it, is a determination of this branch of the controversy. Little or no light is thrown on it by precedent, and it must be wholly worked out by a consideration of the ends and purposes and language of the series of Acts which gave the Pacific Railroads existence.

This system contemplated a continuous railroad track of uniform guage, from the one-hundredth meridian to the Pacific Coast, with no less than three branches; starting from the Missouri River, and connecting with the main trunk on the one-hundredth meridian. In the construction and management of these railroads, four distinct and separate corporations, are employed, three state and one federal. Though all parts of a common work, in their relation to the Government, each was distinct and separate from the other in its property, its corporate origin, its management, and the jurisdiction to which it was subject. This being true, it was plain that self interest, rivalry and the thousand and one elements of discord, which are inherent in the relations of Railroad Companies, occupying to some extent common ground, might practically disconnect these several Companies in the operation of their roads, to that extent that their value would be materially diminished as a through line, both for the use of the public and the Government. Hence the necessity of

legislation to compel their operation in close connection.

Accordingly, the first provision on the subject, is found in Section twelve, of the Act of 1864. This Section deals with the relations of the different Companies to each other. It declares how they shall come to an agreement, when meeting on the 100th meridian, or on a State or Territorial boundary; declares their track shall be of uniform width, grades and curves, on all not exceeding a certain maximum, and the State corporations shall receive and transport all materials and supplies, required for construction of Union Pacific, at cost, and then declares "the whole of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and Government are concerned, *as one connected, continuous line.* The words, "the whole of said railroad," unmistakably refer to the entire road, from the Missouri River to the Pacific Coast, and embrace all the Companies. The claim of defendant is, that to operate as a "continuous line," is to run continuous trains. In other words, that continuous trains must be run from the Missouri River to the Pacific Coast. It is safe to say, that at that time such a feat as running a single train three thousand miles had never been attempted; that the opinion of ninety-nine one-hundredths of civil engineers was opposed to its practicability, and that such a requirement would have been regarded as absurd by all practical railroad managers. It was to be a connected continuous line, i. e. the trains of different Companies, to be run in close connection, so as to form a continuous through line of travel and transportation, in the same sense as the Hudson River and New York Central, Lake Shore & Michigan Southern, and Chicago, Rock Island & Pacific, form a through line from New York to Omaha; not running through trains, but each its own trains in close connection with those of the other. The several trains of the several roads must not only be run in close connection, but in such connection as to make the line continuous or unbroken by delay or hindrance beyond the actual necessities of the safe operation of the road. If the purpose was to require the

same train, whatever Company owned or controlled it, to be run over the entire road of all the Companies constituting the through line, most unfortunate language was used for that purpose.

The word "continuous" is next found in the seventeenth Section of the same Act, which declares that if said *roads* (evidently meaning all the roads constituting the system,) are not completed, so as to form a "continuous line of railroads," from the Missouri River to the navigable waters of the Sacramento River, they shall be forfeited to the United States. This, again, applies the term "continuous" to the whole line owned by different Companies, and upon the theory of the defendant, demands a continuous train over all.

Then comes Sec. 15, of the Act of July 2, 1864. "That the several Companies authorized to construct the aforesaid roads, are hereby required to operate and use said roads and telegraph, for all purposes of communication, travel and transportation, so far as the public and the Government are concerned, as one continuous line." Here, again, the injunction is laid upon *all* the Companies, that *all* their roads must be run as a through, closely connected or continuous line; the manifest object being, as in former provisions, to secure close connections between the different trains of different Companies, rather than to impose the duty of running the same train over all the roads. The fundamental idea and purpose of all these provisions, is to regulate the relations of the different Companies to each other, in their governmental and public character, rather than to deal with each separately. And this is shown by the remainder of the section, which undertakes to regulate the terms, as to rates, time and transportation, upon which business shall be interchanged between them. And this accords with the meaning attached to the word continuous, in Gass vs. New York, Providence and Boston R. Co., 99 Mass., 226. In that case the railroads of two distinct corporations and a steamboat line, each separately operated under distinct management and ownership, but run in close connection as a through route, is said to form a *continuous* line of transportation.

The successful operation of a line of railroad a thousand miles long, must, under the most favorable circumstances, be largely a matter of experience. Nothing else can show precisely how far a locomotive or train can be advantageously run, where divisions and depots and machine and repair shops shall be established, and all these will vary with the varying conditions of fuel, water, soil, climate, grade, elevation and other influences and causes Upon a route. one half of which is without curvature and with a uniform but light upward grade, a class of locomotives and cars may be best used which will be unfit for use on the other half, which is precisely opposite in character. A change of train at the foot of the mountains may be most economical for the Company, and safest and best for passengers and freight, but upon the theory of the defendant, the duty is imperative to run the same train from one end of the road to the other. If compelled to operate the bridge, economy, convenience and safety may require that the business be handled upon it and its approaches with lighter engines and smaller trains than elsewhere, but the inexorable rule of defendant, disregards all such worthless guides as experience, and insists that there shall be no change, no matter what the obstacles encountered. No sane railroad manager would care to have his motive power and rolling stock, massed on the East side of the Missouri River, when the bridge may be disabled by accident, or its approaches swept away by the ice gorges and floods which are the regular Spring product of that capricious stream, and an embargo placed upon business more lasting and effectual than mountain snows. These things may seem trivial to a "citizen of Council Bluffs," anxious to take the train, or ship a package of merchandise on the Iowa shore, but to the Company which has forty thousand dollars a day at stake, they are considerations which have dictated the establishment and retention of terminus, trains and works on the West bank of the Missouri River, for the ten years in which the Company have been engaged in construction and operation of their roads. Accordingto defendant, the "higher law" of Union Pacific Railroad management hereafter is to be the will of the Circuit Court. Yet I can not bring myself to believe this Court will sustain and encourage interference in its business, except at the instantce of the Law Officer of the United States, and in respect to duties plainly enjoined by its charter, towards the public and the Government.

The relief sought in this case is of a different character from that granted in State vs. H. & N. H. R. R. Co., 29 Con., 538. In that case there had been a total abandonment of a portion of the route by reason of a void contract, made with another Company, to divert business from a steamboat line to itself. It was not a question *how* the abandoned portion should be operated, but whether it should be operated at all. And the Court simply held that the Company was not at liberty to abandon any portion of its road, but must run its trains over it. Here, there is no pretense of abandonment, no claim of any want of operation, but the method is the thing in question. To make this parallel with the Connecticut case, the mandamus should have been asked to compel the Railroad Company to run its trains to the Iowa shore, East of and opposite to the North line of Section 10, where the terminus, according to defendant's theory, was fixed, and from which the road was located, built and accepted.

This concludes my argument in behalf of the plaintiff in error. I am conscious of having omitted many things which might properly be urged, and have felt constrained to confine discussion to leading considerations. It lies upon the very surface of this case, that it originates in a neighborhood contention, rather than a public and national grievance. Notwithstanding all the execrations which may be heaped upon the Railroad Company, the fact will remain, that so long as other Railroad Companies, whether influenced by the prohibitory and penal legislation of Iowa, or their own supposed interests, refuse to permit their cars and trains to cross the bridge, whatever may be the event of this case, transfer trains must continue to run, or two-thirds of all the trains arriving at or departing from the Missouri River at Omaha and Council Bluffs, will be without immediate and convenient connections with other roads. In case of decision adverse to the Railroad Company, a great additional burden will be laid upon it and the obnoxious Bridge Transfer still survive as a public necessity. The real parties responsible for the maintenance and continuance of the Bridge Transfer, are those Railroad Companies which refuse to use it, and the legislation which has compelled this refusal. Aside from the prohibitory legislation of Iowa, (just declared unconstitutional), and this suit, the vexed transfer question would have been long ago solved by a general use of the bridge by all railroads having termini on the Missouri River, at or near Omaha

and Council Bluffs. To lay upon the Union Pacific Railroad Company, alone, the burden of operating this bridge, with all its through trains, in addition to its transfer trains, at the cost of a revolution in its business; the destruction and removal of its works and headquarters, and to the injury and ruin of a community of twenty thousand people, built up on a construction of the law, now sought to be overturned, from whom it has received large donations and benefits, at any time and under any circumstances, would be to inflict upon it and them a great injustice. But to do it in the face of ten years of construction, declaration and action of all the officers and agents of the United States, establishing and executing the law, in direct opposition and conflict with the interpretation contended for by defendant, may well be regarded as a calamity by both road and people Yet, so far as the road is concerned, these consequences will be light and frivolous, compared with what I can not but regard as the extraordinary claim, that every citizen of the United States may at his own option and on his own motion, constitute himself the censor of this federal corporation, and moved by his own wish, malice or caprice, set in motion the summary remedy of mandamus, to compel obedience to his behest. Well might the Government, in respect to a corporation with which it has close relations, and from which it exacts important duties, arm its law officers with this power, but it is incredible that it should be lodged in the hands of the public at large.

I, therefore, respectfully submit, that the judgment of the Court below is contrary to law, not supported by reason, and ought to be reversed.

A. J. POPPLETON.
Counsel for Pl'ff in Error.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

UNITED STATES, EX REL. S. E. HALL and JOHN W. MORSE,
Dfts. in Error.

The defendant in error, after concluding argument upon the merits, makes objection to the jurisdiction of the court, claiming that the judgment of the court below is not reviewable in this court.

No motion to dismiss for want of jurisdiction having been made, and the point being thus raised after my argument was completed and served on defendants, I submit the following in brief reply:

The first objection rests upon the proposition that mandamus is not a "civil action," within the meaning of sec. 691, U. S. Rev. Statutes.

It would seem extraordinary legislation to confer an original jurisdiction, involving such immense issues, as may spring from the statute in question, and make that jurisdiction final.

It seems plain that the words "civil action" are used in the statute in contradistinction from suits in equity and admiralty. They are equivalent to "action a slaw." It certainly cannot be claimed that mandamus is an equity proceeding. The fact that one of the rules of decision in mandamus is, that the absence of a remedy by action must appear, does not change the character of the proceeding. Mandamus may be a "special and extraordinary" action, but it is none the less an action at law; and so this court has held in Commonwealth of Kentucky *vs.* Dennison, 24 Howard, 97, in which, after referring to the history and former character of the writ, the court say; "It is equally well settled that a mandamus, in modern practice, is nothing more than an action at law. See also Kendall *vs.* United States, 12 Pat., 612; Kendall *vs.* Stokes, 3 Howard, 100.

The court also held, in Ward *vs.* Gregory, 7 Peters, 633, that a final judgment, in mandamus, was reviewable in this court by writ of error only, because it was an action at law.

It is admitted that it is competent for this court to review on error proceedings by mandamus in the Circuit Courts to compel payment of judgments rendered therein, but it is insisted hat such actions are not brought by "original process" into the Circuit Court. Is it not true that while such actions are auxiliary, and can only be instituted in aid of the rightful jurisdiction of the court, they are nevertheless separate and distinct suits, instituted like others upon "original process."

When contending that any private person, on behalf of the public, might institute the pending proceeding, mandamus, in the opinion of defendant, had ceased to be a "prerogative writ," and had became an ordinary action at law. But when it is deemed necessary to the exigencies of defendant's case to escape from this court, the writ becomes "prerogative" in the highest degree, in fact anything but what the court have repeatedly declared it to be, "nothing more than an action at law."

I am unable to see Bath County *vs.* Amy, 13 Wallace, 244, in the same light as defendant. It is there expressly stated that mandamus is a common law action, but not covered by the 11th section of the Judiciary Act, the jurisdiction to issue it flowing from a different source.

The second objection is, that the "matter in dispute does not exceed the sum of five thousand dollars."

It seems to be settled that the right of review is confined to cases in which "the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated in the ordinary mode of a business transaction."

The company in this proceeding is contending that one of its rights, flowing directly from its charter, is to run its trains to and from the west bank of the Missouri river only; the defendant contending that this right does not exist, but that its obligation is to run them to the east side of the river, over its bridge. What is the pecuniary value of this right to the company? To a practical man, it is absurd to say its value is not susceptible of calculation. It may not admit of exact computation, but it may be approximated with reasonable correctness and to such a degree as to render it certain that its value is far in excess of the amount necessary to give this court jurisdiction. Accordingly, affidavits of practical men, those actually engaged in operating the road were, by leave of the court below, filed for the purpose of showing the amount in controversy.

The position of defendant is that any right or franchise claimed by the company in respect to the operation of its road, which may be negatived by the Circuit Court in this proceeding has no "known and certain" value. It is a matter of current history that the Kansas Pacific Railway Company at one time insisted that the Union Pacific was under obligation to pro-rate mile for mile with it on all business interchanged between the two roads. That is to say, as the Kansas Pacific was the longer line from Kansas City to Cheyenne than the Union Pacific from Cheyenne to Ogden, that the latter should carry over its mountain divisions for a less rate per mile than the former over its road of light grades and slight curvature. A mandamus commanding the operation of the Union Pacific in accordance with this claim would negative a right claimed under the charter, whose pecuniary value to the company is immense. If the remedy will lie in this case it will in that.

Will the court say such a judgment would not be reviewable for want of sufficient value of the matter in dispute. Or take another example: In this case in the court below the right of the company to tolls for transportation over its bridge was in question—a right whose pecuniary value for four years past is known with accuracy. If the judgment of the Circuit Court had negatived that right, will it be claimed that it would not have been reviewable. If this is true, some of the largest pecuniary interests ever in controversy, have been committed to the Circuit Courts, and under the form of enforcing a public duty they may, without review, deny and negative rights of immense pecuniary value, which originate in the charter and are rights of property, whose value is susceptible of computation. It was not enough to single out this unfortunate company as defendant in an original mandamus proceeding and (according to defendant) make this "special and extraordinary" proceeding available to everybody who chooses to elect himself the representative of the public, but it must likewise be denied the right of appeal. If ever case existed in which the right of review ought to exist, this is that case, which, in the language of the court below, "has excited intense local feeling," and is "one involving large interests," and the court below does not seem to have regarded its determination as final.

In this proceeding it is plain that while vast pecuniary interests may be practically disposed of, there can never be a money judgment or a judgment operating directly upon specific tangible property. Yet rights of property, originating in the charter must be constantly dealt with. The pecuniary value of these rights must be and can easily be measured in most instances. The pecuniary value of the rights in dispute in this case is measured by the difference in the cost of operating the road as now operated and that of operating it as required by the court below. This difference is shown by affidavit, by leave of the court below, and is undisputed.

Not anticipating an objection to the jurisdiction, but rather understanding that such a claim had been abandoned and being obliged to make reply without access to books, I have suggested what seem to me obvious but effective considerations. Surely the company cannot be denied the right of

review in a proceeding which may be used to strip it of pecuniary interests of vast amounts as a direct consequence because the matter in controversy is not money or specific property, but a right, duty or obligation, whose affirmance or denial is a direct pecuniary advantage or injury, whose value may be and is measured in money, and exceeds a hundred fold the limit of jurisdiction.

A. J. POPPLETON,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1875.

THE UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE UNITED STATES, *ex rel*, SAMUEL E. HALL AND JOHN W. MORSE,
Defendants in Error.
(No. 584.)

Error to the United States Circuit Court, for Iowa.

ARGUMENT OF JOHN N. ROGERS,
Counsel for the Defendants in Error.

PRELIMINARY STATEMENT.

MAY IT PLEASE THE COURT:

By an act of Congress of March 3, 1873 (Stats., vol. 17, p. 509, sec. 4, last clause: U. S. Rev. Stats., Sec. 5262) it is enacted as follows: "The proper Circuit Court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company *to operate its road as required by law*."

Under this enactment the present proceeding has been instituted. It is a mandamus according to the common law course of procedure, the alternative writ having been issued upon an information filed by Hall and Morse as relators.

It is claimed on behalf of the relators, that this piece of railway is an integral part of the Union Pacific Railroad, as provided for by law. That the eastern terminus of that road, as fixed by law and executive action in pursuance thereof, is on the eastern shore of the Missouri river, in the State of Iowa. That the bridge was authorized to be built, and has been built, for the purpose of enabling the company actually to construct and operate their road to and from its said legal terminus, and that the company is bound to operate the track laid on it, and the approaches thereto, *as part of its road*, by running its regular freight and passenger trains over it, to and from such terminus.

The company, on the other hand, contends that the terminus of its railroad is on the west side of the river, at Omaha. That neither the bridge nor the track laid over it constitutes any part of its road, in legal contemplation. That these have been constructed, and are held and oper-

ated, under a distinct and separate franchise from the railroad franchise; that the company's rights and obligations in respect thereto are substantially the same as if the railroad were owned and operated by a different corporation, and that hence it is not bound to operate the road over the bridge as part of its railroad proper, nor to run its railroad trains, nor, indeed, any trains or conveyances whatever, over it.

The important and vital questions arising on this record may therefore be thus stated:

1st. Is the legal eastern terminus of the Union Pacific Railroad on the eastern or the western side of the Missouri river?

2d. What is the legal relation existing between the Union Pacific Railroad Company's bridge and railway track across the Missouri river, and the Union Pacific Railroad?

The historical narative of the rise and progress of this controversy, with which, under the heading of "case stated," the learned counsel for the company prefaces his abstract of the record, does not seem to be based particularly upon anything contained in the record, and in some of its statements certainly travels altogether beyond it. To that extent it appears to us to be open to objection. The *facts* upon which the decision must rest are to be found *exclusively* in, (1) the allegations of the alternative writ (record, pp. 19–21); (2) the return thereto (record, pp. 22–8); and (3) the answer of the relators to said return (record, p. 41–3), alleging some new matters of fact, which were admitted in the hearing below to be true, as is shown by the record entry (p. 43).

Of the writ and return, the counsel for the company has furnished an abstract (pp. 4–7.) The answer of the relators to the return he has omitted entirely—doubtless through

inadvertence. The substance of its allegations is as follows:

Relators' answer to return (Record, pp. 41-3).

The answer to the return first sets forth, at length, President Lincoln's message to the Senate of March 9, 1864, transmitting a copy of his order of March 7, 1864, fixing the point of commencement of the road, which message is set forth in the statement hereinafter made.

It further avers that the company, after laying down a track from their pretended "initial point," on the west bank of the Missouri river, about two miles above the bridge, and obtaining from the United States subsidy bonds for said two miles of track, yet never used or operated said track, and never, in fact, established or used said "initial point" as its terminus, or ran trains to or from it; but, long before the construction of the bridge, it took up and removed said track, and has never since had or operated any railroad to or near said "initial point." That the actual main station or terminus of the road on the west side of the river is about two miles south of said "initial point," and in close proximity to the western end of the bridge. That a track of the company, branching from its original track, runs directly to said station, and thence over the bridge into Council Bluffs.

That the company has wholly abandoned said pretended "initial point" as the point of commencement of its road on the western side of the river, and that the bridge is located within the limits of the President's order of Nov. 17, 1873 (hereinafter set forth).

The mandate of the alternative writ required the company "to operate the whole of your said railroad, from Council Bluffs westward, and including that portion of your said road between Council Bluffs and Omaha, and constructed over and across the said bridge, as one continuous line, for all purposes of communication, travel and transportation. And especially to start your regular

through freight and passenger trains westward bound from said Council Bluffs, and to run your eastward bound trains of both descriptions through and over said bridge, to Council Bluffs, and to run and operate your said trains to and from said Council Bluffs, under one uniform time schedule and freight and passenger tariff with the remainder of your said road, and to wholly desist and refrain from operating said last mentioned portion of said road as an independent and separate line, and from causing and requiring freight or passengers bound westward and eastward to be transferred as aforesaid at said Omaha."

The theory on which the writ was framed, and which was urged in argument in the court below, was that the company was not only bound to operate the bridge as a part of its road, by running its regular trains over it, but that it was bound also to operate it under the same tariff of freights and passengers as the remainder of the road, having no right to charge special and higher rates for transportation over the bridge.

On the last-mentioned point the court held in favor of the company, and the relators, submitting to that decision for the purposes of this case, took leave to amend the writ so as to make it conform thereto, and the court thereupon ordered a peremptory writ. in conformity with the alternative writ as amended. There is therefore no question before this court as to the right of the company to collect special rates of toll for transportation over the bridge. The writ as ordered in no wise interferes with that asserted right, and the relators are not complaining of the decision in respect thereto, though they do not concede its correctness.

The elaborate assignment of errors by the counsel for the railroad company seems to consist rather of heads of argument than of specifications of actual rulings or orders made by the court below, and here complained of. The

record shows but three orders or decisions, of any kind, made in the cause below, viz.: 1st, in granting the alternative writ; 2d, in overruling motion to quash the service of the writ; 3d, in granting the peremptory writ. Of the second of these, no complaint is here made, nor could be, since the defendant afterward elected to make a return to the writ. The first is necessarily merged and comprehended in the third. So that the sole question now before the court is, did the court below err, on the case before it, in granting the peremptory writ? And the "assignment of errors" must be regarded as a statement of the *reasons* of counsel for maintaining that order to be erroneous.

Some of these assignments are not urged in the opening argument by Mr. Poppleton, and, it is presumed, may be passed over in silence on our side.

Departing from the order observed by the counsel for the company, we propose first to discuss a question preliminary in its nature, and not relating to the merits.

I.

It is argued (p. 34) that the writ was improperly issued on the application of private persons, without the intervention of the law officers of the United States.

The first question arising under this head is, whether this objection is open to the plaintiff in error, in the present attitude of the case.

The railroad company, though notified, made no appearance to resist the motion for the alternative writ, on this ground or any other. It is indeed stated in the opinion delivered by his Honor the Circuit Judge on granting the motion (record, p. 13), that counsel, without appearing, were permitted to be heard *ut amici curiae* in opposition. This is not properly matter of record in the case, and no advantage can be taken of it on error. The writ must be

treated here as having been granted *ex parte*, without opposition. Neither did the company, after issue and service of the writ, move to quash or supersede it, as improperly issued on the relation of private parties. Their objection to the *service* having been overruled, they made return to it, undertaking to show cause on the merits against its being made peremptory. The learned counsel are therefore obliged to maintain, under this head, that in that attitude and at that stage of the proceedings, it was error to order the peremptory writ, because of a mere irregularity in the mode of applying for the alternative writ. They seek to make available in a court of error for the reversal of a final judgment on the merits an objection to the regularity of the preliminary procedure, which they never made (in any way which this court can notice) in the court below.

On this precise point Judge Cowen, delivering the opinion of the Supreme Court in The People *vs.* Collins, 19 Wend., 56 (67), says : "Beside, the defendants have made a return and put the matter in a train for decision on the merits." * * * * * * * * * *

"It is a mere question of regularity in the mode of obtaining the writ ; and in analogy to the like cases, would more properly have been raised on the motion for the alternative mandamus, or if that was *ex parte* and without notice, by a direct motion to set aside the writ as having improvidently or irregularly issued. The attorney general might then have been consulted, and the suit been summarily arrested, or the defect supplied by an appearance on his part. The return is in nature of a plea, which cannot set up mere matter of irregularity. That an objection of form should come before the return, is supported by the reasoning of the chancellor and several cases cited by him in The Com. Bank of Albany *vs.* Canal Comrs. (10 Wend., 30). Matter of mere abatement in a plea is overruled by matter in bar. It seems to me, therefore, that it would

have been too late to come with this objection, if it were well founded in principle."

It should be noted that this was said in the court of *original jurisdiction*, the objection being there made in opposition to granting the peremptory after return to the alternative writ. How much more forcible is the reasoning where the point is made for the first time in the appellate court. See also High on Extr. Remedies § 523

2. As to the merits of this objection, supposing the plaintiff in error to be in a situation to urge it, we refer, in the first place, to the able opinion of the Circuit Judge, at pp. 13–17 of the record, where the point is thoroughly considered and the authorities, English and American, bearing on it are cited. It is there shown that the great preponderance of American authority, and the unquestioned course of English practice, sustain the right of any citizen to apply for a mandamus to compel the performance of a duty to the public at large, incumbent upon a corporation or public officer.

A late able text-writer states the same rule as supported by the decided preponderance of authority.

High on Extr. Rem., § 431-3.

We feel constrained here to except to the accuracy of the balance struck by Mr. Poppleton, on page 38 of his argument, between the American authorities, *pro* and *con*, upon this question. To the *three* cases there placed in our side of the scale, viz.,

People vs. Collins, 19 Wend., 56,
Hamilton vs. State, 3 Ind., 452,
Pike Co. vs. State, 11 Ill., 202,

we beg leave to add the following:

Ottawa vs. People, 48 Ill., 233.
State vs. Co. Judge, 7 Iowa, 186, 202.
State vs. Bailey, *id.*, 390, 397.
People vs. Halsey, 58 Barb., 547.

Same Case, 37 N. Y.. 344.
People vs. Supervisors, 18 How., Pr. 461.
State vs. Rahway, 33 N. J., Law 110.
Watts vs. Carroll Parish, 11 La. Ann., 141.
Cannon vs. Janvier, 3 Houst. (Del.), 27.

It will be found, on examination of the cases cited against us on this point, that while the opinions contain expressions more or less unfavorable to the rule we contend for, the decision was, in nearly every case, made upon the merits. These cases can hardly be regarded as settling the rule adversely to us, even in the courts by which they were decided.

In the case in 6 Tex., 457, we fail to discern anything materially bearing upon the question. The only English case cited (Rex *vs.* Merchant Tailors' Co., 2 Barn. and Ad., 115) was not a case of *public* right, being an application by members of a private corporation to compel the officers to permit the relators to inspect its books.

In addition to the English cases cited by the learned circuit judge, the following may be referred to as illustrating the constant practice of the Queen's Bench on this subject—a practice so familiar and settled that it does not appear to have ever been called in question :

Reg. vs. York, etc., Ry. Co., 1 Ell., and Bl., 178, 858.
Reg. vs. Lancashire, etc., Ry. Co., *id.* 228, 873.
Reg. vs. Gt. West. Ry. Co., *id.* 253, 874.
Rex. vs. Ouze Bank Comrs., 3 Ad. and Ell., 544.

In each of the three cases in Ell. and Bl., a mandamus was granted by the Queen's Bench to compel the company to construct its line of road, on the application of private parties; and the then Attorney and Solicitor General, though employed as counsel, were on opposite sides, showing that they were not appearing in their official capacities. The cases were reversed on the merits in the Exchequer Chamber. No objection appears to have been made in these, or any other English case, to the right of private persons to apply for the writ.

In Clarke *vs.* L. & N. Canal Co., 6 Ad. & Ell. N. S. 898, Clarke had applied for and obtained an alternative mandamus to compel the Canal Co. to establish a uniform rate of tolls, or to equalize the rates of toll on coals, coke, etc., as required by act of parliament. A return having been made, Clarke pleaded thereto in his own name, taking issue thereon ; and judgment having been rendered in the Queen's Bench, on demurrer to such pleas, "that the said several pleas and traverses of the said Thos. Clarke, by him, etc., pleaded, etc., are not sufficient in law for the said T. Clarke to have a peremptory writ of mandamus, etc.," with costs against Clarke, he as plaintiff brought error thereon to the Exchequer Chamber, where the judgment was affirmed on the merits, because the act did not impose the duty contended for. This case well illustrates the course of the English practice.

See also Reg. *ex. rel.* Armstrong, and al., *vs.* Fall and als., Churchwardens, 1 Ad. and Ell., N. S., 636, a mandamus prosecuted by parishioners to compel the parish officers to produce the parish rates and books at the scrutiny of a poll for the election of churchwardens ; where the relators having traversed the return, and obtained a verdict in their favor, without damages, it was held that the entry of the verdict on the postea with nominal damages was right, because the relators, though they had no personal interest, had the right to traverse the return, and to nominal damages on a verdict in their favor.

In view of these and other cases, the statement as to the English practice, in People *vs.* Regents, 4 Mich., 103, (quoted page 38 of Mr. Poppleton's argument,) would appear to have little foundation; especially as no authorities are cited in support of it.

Considering the point upon principle, the question is, who may apply for the writ ? not who may be relators. If the Attorney General moved for it on behalf of the gov-

ernment, the application surely might be based on affidavits or on information sworn to by private parties. No formal petition or information is necessary. The English practice is to move on affidavits ; so in New York and elsewhere. Until the writ issues there is no writ or proceeding pending. Hence, as matter of form, it is improper to entitle the affidavits in any proceeding.

Haight *vs.* Turner, 2 Johns., 371.
People *vs.* Tioga, C. P., 1 Wend., 291.
People *vs.* Dikeman, 7 How. Pr., 124.

The government does not become formally a party until the writ issues. The same rule applies to an attachment for contempt.

Folger *vs.* Hoogland, 5 Johns., 235.
In re Bronson, 12 id., 460.

The proceedings, until the alternative writ issues, are merely preliminary. They are analogous to laying a complaint and evidence before a grand jury in a criminal prosecution; and the court, on motion for the alternative writ, acts like a grand jury in determining whether there is reasonable cause for instituting the proceeding; and if the writ is ordered to issue, it is like the finding of an indictment. In neither case is it in the absolute discretion of the government officers to determine whether the case shall be prosecuted. In the one case that is for the grand jury, in the other for the court, to decide.

Nor is there anything, as we conceive, in the nature of this particular case, nor in the act of Congress conferring this jurisdiction, which requires or justifies its limitation to a proceeding instituted by the government, through its law officers. We do not agree, in the first place, that this jurisdiction is conferred *solely* for the benefit of the government, to enforce the obligations of the Railway Company to the United States in their capacity of sovereign. We insist that it is intended as well for the benefit and protection of the public at large, and of

each citizen who has occasion to deal with the company in its capacity of common carrier. The clause by which this jurisdiction in mandamus is created, though contained in a section of the act occupied chiefly with providing for a particular suit in equity against the company and other parties, to be brought by the Attorney General in the name of the United States, for specified purposes, relates to a quite different subject matter, and was added to the section, as we understand, by a distinct amendment. The former part of the section does not confer any permanent or general jurisdiction. It is special and temporary in its character. It not merely authorizes, but directs the Attorney General to bring a particular suit, for particular purposes; and that one proceeding having been brought and determined, the force of that part of the act is spent and exhausted. The clause now in question vests a permanent jurisdiction, not confined to any one proceeding, but to be invoked from time to time as occasion may arise, by any party entitled to its benefit by the general rules of law governing the remedy thus granted. It is worthy of note, as remarked by the learned Circuit Judge, that while the Attorney General is expressly instructed to bring the suit in equity provided for by the section, there is no such provision in respect to the mandamus proceeding, nor any limitation of the right to institute it to any officer or person whomsoever.

No doubt the duty sought to be enforced in this case is a *public* duty, in the sense that it concerns the public at large, and its performance will benefit all citizens alike who may transact business with the company, and not merely the relators or any particular person. And we do not question that, it being of this nature, the Government, as representing the public rights, might properly prosecute a mandamus to compel its performance. But it is not a duty which the company owes to the *government*, as distinguished from the *people* of the United States; like for instance,

the duty to transport U. S. troops, munitions and stores over the road, on the terms provided for by the charter. And such being the case, we deny that it is left to be determined by the sole will and pleasure of the executive department, whether the duty shall be enforced or not, so that in case of its neglect or refusal to institute the necessary proceedings, they cannot be commenced at all. Such a view is at variance with the spirit of republican institutions, and in many cases might result in a denial of justice.

And we go farther than this, and maintain that the remedy by mandamus provided by the act, is not limited to cases of public right or duty, but may well be applied to redress a special and peculiar grievance sustained by an individual at the hands of the company, in its mode of operating its road. For example: the Supreme Court of Illinois has in some recent well-considered decisions sanctioned a most useful application of the remedy by mandamus, at the instance of the owners of a grain-elevator situated upon the line of a railway, to compel the railway company to deliver at their elevator grain shipped over the road and consigned to them; the company wrongfully refusing to deliver except at another elevator selected by them.

C. & A. R. R. Co. *vs.* People, 55 Ill., 95.
C. & N. W. R. R. Co. *vs.* People, 56 Ill., 365.

These decisions are based on the common law obligations of carriers to refrain from unjust discrimination between different parties dealing with them, and the inadequacy of the remedy afforded by an action for damages, for a perpetually recurring injury of this kind, persisted in by the Railroad Company in pursuance of its settled rule.

Now, such unfair discriminations or preferences between different parties by the Union Pacific Company in the operation of its road, are by section 15 of the act of July 2,

1864, amending the company's charter (Stats., vol. 13, p. 362), expressly forbidden ; and by the act of June 20, 1874 (Stats., 1873–4, p. 111), amending that section, an action for treble damages is given to any person injured by a violation of this enactment. This last act is a sufficient answer to the observation of the learned counsel (p. 37), that the act giving the right to a mandamus "nowhere authorizes, in express language, private persons to institute suits of any character against the company." The two acts are *in pari materia*, and should be interpreted in the light of each other. It is obvious that for a continuous and settled line of wrongful conduct by a powerful corporation, in the mode of operating its railroad, inflicting injury on a private person, the remedy by action is wholly inadequate. And we see no reason why any citizen thus injured by the U. P. R. R. Co. may not, under the doctrine of the Illinois cases just referred to, invoke the remedy by mandamus in the U. S. Circuit Court to compel the company to "operate its road as required by law," so as to redress his own special and individual grievance, occasioned by a violation, *as to him*, of the company's duty in operating its road.

3. Finally : if it should be held that, to entitle a private citizen to apply for a mandamus to compel the performance of a public duty, he must, like a plaintiff suing in equity to enjoin a public nuisance, show that he has some special interest in the matter beyond that of the public at large, we submit that this is sufficiently shown by the relators in this case. They allege that they are merchants, doing business at Council Bluffs, and continually obliged in the course of their business, to ship and receive goods over the defendants' road, and that, in consequence, they sustain special damage, loss and inconvenience by the mode of operation complained of and sought to be remedied.

In the celebrated case of Pennsylvania *vs.* The Wheeling and Belmont Bridge Co. (13 How., 518), the State of

Pennsylvania was held entitled to maintain a suit in equity in this court to abate a bridge across the Ohio river, wholly outside of her territorial limits, as a public nuisance impeding the navigation of the river, on the sole ground that she owned a line of railway and canal terminating on the river at Pittsburgh, and as such owner sustained damage by the obstruction of the navigation of the river by steamboats connecting with its said lines, through the consequent diversion of travel and transportation to other routes.

Any citizen carrying on the business of a carrier, by a line of conveyance connecting with navigation on the river, would come within the same rule, and the special interest in such case does not consist in any personal and direct interest in the navigation of the river (such as owning or running boats thereon), but in an independent business carried on by the individual, the prosperity of which is incidentally impaired by an obstruction to the *public* right of free navigation of the river.

The principle, it is submitted, is directly applicable to the relators in this case; and surely the rule can be no more stringent as to the necessity of a special interest in them (if there be any such necessity) than in the case of a party suing for relief against a public nuisance.

II.

It will be convenient, as preliminary to the discussion of the merits of the case, to present an orderly and *complete* statement of the legislation and executive action bearing on the questions to be determined. This is but partially set forth in the opposite argument, and it is believed that the advantage to be derived from presenting the entire action of Congress and the executive in one connected and comprehensive view, will justify some repetition. The particular attention of the court is respectfully invited to this statement:

ACT OF 1862.

The Union Pacific Railroad Company was created by the act of Congress of July 1, 1862 (stats., vol. 12, p. 489), entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," which provides as follows:

(Sec. 1, p. 489.) That numerous individuals named are incorporated as "The Union Pacific Railroad Co."; and said corporation is authorized and empowered to construct and operate a *continuous* railroad and telegraph, with the appurtenances, from a point on the 100th meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river, and the north margin of the valley of the Platte river, in the Territory of Nebraska, to the western boundary of Nevada Territory, "upon the route and terms hereafter provided."

(Sec. 7, p. 493.) That said company shall file their assent to this act, under their seal, in the Department of the Interior, within one year, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada Territory, before July 1, 1874. That they shall *designate the general route of the road*, as near as may be, *and file a map thereof in said department*, within two years: * * *

"*Provided*, that in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction *the Iowa and Missouri branches, as hereinafter provided.*"

(Sec. 8, p. 493.) That the point of commencement of the road and telegraph, on the 100th meridian west of Greenwich (as before provided), shall be fixed by the President of the United States, after actual surveys. That the road shall run thence westerly on the most direct, central

and practicable route, through the Territories of the United States, to the western boundary of Nevada Territory, "there to meet and connect with the line of the Central Pacific Railroad Company, of California."

(Sec. 9, p. 493.) That the Leavenworth, Pawnee and Western Railroad Company, of Kansas, are authorized to construct a railroad and telegraph line "from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad, of Missouri," to said point on the 100th meridian west of Greenwich, on the same terms and conditions, etc., to connect with the Union Pacific Railroad: * * * said line to be so located * * * that the several railroads *from Missouri and Iowa*, herein authorized to connect with the same, can make connection within the limits prescribed by this act," etc.

(Sec. 12, p. 495.) Provides that the track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, *so that when completed, cars can be run from the Missouri river to the Pacific coast.* "The whole line of said *railroad and branches* and *telegraph* shall be operated and used *for all purposes of communication, travel and transportation*, so far as the public and government are concerned, as *one connected, continuous line.*

(Sec. 13, p. 495.) That the Hannibal and St. Joseph Railroad Company, of Missouri, may extend its road from St. Joseph, *via* Atchison, to connect and unite with the road through Kansas, upon the same terms and conditions, etc.: *Provided*, that if actual survey shall render it desirable, said company may construct their road, with consent of Kansas Legislature, on the most direct and practicable route west from St. Joseph, Mo., so as to connect and unite with the road leading from the western boundary of Iowa, at any point east of the 100th meridian, etc., or with the main trunk road at said point.

(Sec. 14, p. 496.) That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph, from a point on the *western boundary of the State of Iowa*, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company, at some point on the 100th meridian of longitude aforesaid, from the point of commencement *on the western boundary of the State of Iowa*, upon the same terms and conditions, etc.: *Provided*, that a failure on the part of the company to make said connection within the time aforesaid, etc,, and to *operate said road in the same manner as the main line shall be operated*, shall forfeit to the government all the rights, privileges and franchises granted to, and conferred upon, said company by this act; and whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the Union Pacific Railroad Company is authorized and required to construct a railroad and telegraph *from Sioux City*, upon the most direct and practicable route, to a point on, and so as to conneet with, the branch railroad and telegraph, in this section before mentioned, etc.

(Sec. 17, p. 497.) Provides for a forfeiture to the government. if said roads are not completed so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by July 1, 1676.

Such were the provisions of the original act, bearing on the questions now under discussion.

The scheme of the act, it will be noticed, contemplated a main trunk line of road, to run westward from a point on the 100th meridian of longitude west from Greenwich, to be fixed as provided in the act (Secs. 1–8), at which point it was to connect with three converging branch roads, hav-

ing their respective eastern termini at different points on the Missouri river, the most northerly *at Sioux City, in the State of Iowa;* the most southerly at the mouth of the Kansas river, and south of that river; and the central or intermediate line at "a point on the western boundary of the State of Iowa, to be fixed by the President of the United States."

A fourth branch is also provided for, to start from St. Joseph, Missouri, and to connect either with the southern or the central branch, as may be found most expedient.

Of these branches, two, viz: The Sioux City and (what may be called) the Iowa branches, are required to be built *by the Union Pacific Company.* The branch from the mouth of the Kansas is authorized to be built by the Leavenworth, Pawnee and Western Railroad Company (now known as as the Kansas Pacific), of Kansas. The Hannibal and St. Joseph Railroad Company, a Missouri corporation, is authorized to construct the line from St. Joseph.

It should be noted that the eastern termini of *two* of these branch lines are expressly fixed at points on the east side of the Missouri river, viz: at Sioux City, Iowa, and St. Joseph, Missouri. The learned counsel for the company appears to have lost sight of the provision of Sec. 9, as to the Sioux City branch, in his italicised statement (p. 14) that "in this scheme, Congress has not, in express language, provided for the construction, by this federal corporation, of any railroad whatever within the geographical limits of a State."

A third is fixed at the mouth of the Kansas, and at the south side thereof (the site of Kansas City, Missouri), the point at which the Missouri river bends and flows eastward toward the Mississippi, and hence does not need to be crossed by the line of railway (the Pacific, of Missouri) running to St. Louis, with which the branch of the Union

Pacific, to commence at that point, is by the act required to connect.

Close connection with lines running eastward from the Missouri river is carefully provided for in respect to each branch whose point of departure is definitely fixed by the act. That from Kansas City is to connect with the Missouri Pacific; that from St. Joseph is to be a continuation of the Hannibal and St. Joseph Road, then already completed. The Sioux City branch is to be constructed by the Union Pacific Railroad Company, "whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City."

It is evident that a similar connection was contemplated for the central or "Iowa" branch with one or more of the lines of railway then progressing westward across Iowa, and since completed to Council Bluffs.

All these are circumstances of weight, to be considered in determining what is meant by the language, "a point on the western boundary of the State of Iowa, to be fixed by the President of the United States," employed to designate the terminus of the central or Iowa branch.

ACT OF 1864.

Nothing material, however, was done toward the construction of the road, until after the passage of the amendatory act of July 2, 1864 (Stats., vol. 13, p. 356), granting largely increased facilities and assistance to the company. This act contains the following provisions:

(Sec. 6, p. 360.) That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across *the Missouri river, and other rivers which its road may pass in its course*, and authority is hereby given said corporation to construct *bridges over said Missouri river, and all other rivers, for the*

convenieuce of said road: Provided, that any bridge or bridges it may construct over the *Missouri river, or any other navigable river on the line of said road*, shall be constructed with suitable and proper draws, etc., and shall be *built, kept and maintained at the expense of said company*, in such manner as not to impair the usefulness of said rivers for navigation."

(Sec. 15, p. 362.) That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and government are concerned, *as one continuous line, etc.*

ACTION OF THE EXECUTIVE.

In fulfillment of the duty devolved upon the President of the United States by the 14th section of the original act, the following executive order was made by President Lincoln, November 17, 1863 :

EXECUTIVE MANSION, WASHINGTON,
November 17, 1863.

"In pursuance of the 14th section of the act of Congress, entitled 'an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862, I, Abraham Lincoln, President of the United States, do hereby fix so much of the western boundary of the State of Iowa as lies between the north and south boundaries of the United States Township within which the city of Omaha is situated, as the point from which the line of railroad and telegraph, in that section mentioned, shall be constructed.

"ABRAHAM LINCOLN."

The following further order was made by the President, March 7, 1864, on the application of the company :

"In pursuance of the provisions of section 14, of the 'act of Congress entitled, 'an act to aid in the construction 'of a railroad and telegraph line from the Missouri river to 'the Pacific ocean, and to secure the government the use of 'the same for postal, military and other purposes,' ap- 'proved July 1, 1862, authorizing and directing the Presi- 'dent of the United States to fix the point on the western 'boundary of the State of Iowa, from which the Pacific 'Railroad Company is, by said section, authorized to con- 'struct a single line of railroad and telegraph upon the 'most direct and practicable route, subject to the approval 'of the President of the United States, so as to form a 'connection with the lines of said company, at the point 'on the 100th meridian of longitude, in said section nameed:

"I, Abraham Lincoln, President of the United States, 'upon the application of said company, designate and 'establish such first above named point on the *western 'boundary of the State of Iowa, east of, and opposite to, the 'east line of section* 10, *in township* 15, *north of range* 13, *'east of the 6th principal meridian, in the Territory of Ne- 'braska.*

"Done at the city of Washington, this 17th day of 'March, in the year of our Lord 1864

"ABRAHAM LINCOLN."

And on the 9th day of March, 1864, the President sent the following message to the Senate, with a copy of the said order of March 7, 1864:

"TO THE SENATE OF THE UNITED STATES:

"In compliance with a resolution of the Senate of the '1st instant, respecting the point of commencement of the 'Union Pacific Railroad, on the 100th degree of west longi- 'tude, and of the branch road from the western boundary 'of Iowa to the said 100th degree of longitude, I transmit 'the accompanying report from the Secretary of the Inte-

'rior, containing the information called for. I deem it 'proper to add that on the 17th day of November last, an 'Executive order was made upon this subject, and delivered 'to the vice-president of the Union Pacific Railroad Com- 'pany, *which fixed the point on the western boundary of the 'State of Iowa, from which the company should construct 'their branch road to the 100th degree of west longitude, 'and declared it to be within the limits of the township in 'Iowa opposite the town of Omaha, in Nebraska.* Since 'then the company has represented to me that upon actual 'surveys made, it has determined upon the precise point 'of departure of their said branch road from the Missouri 'river, and located the same as described in the accompa- 'nying report of the Secretary of the Interior, which point 'is within the limits designated in the order of November 'last, and inasmuch as that order is not of record in any 'of the executive departments, and the company having 'desired a more definite one, I have made the order, of 'which a copy is herewith, and caused the same to be filed 'in the Department of the Interior.

"ABRAHAM LINCOLN.

"EXECUTIVE MANSION, March 9, 1864."

Under these enactments and this executive action, the Union Pacific Railroad was built and put into operation from Omaha to its junction with the Central Pacific. Temporary means of transit across the Missouri river were employed, and the bridge authorized by the act of 1864 was commenced and in process of construction, when Congress passed the act of February 24, 1871 (Stats., vol. 16, p. 430), as follows:

ACT OF 1871.

"An act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:*

"That for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Company be, and it is hereby authorized to issue such bonds, and secure the same by mortgage *on the bridge and approaches, and appurtenances*, as it may deem needful to construct and maintain *its bridge over said river*, and tracks and depots required to perfect the same, *as now authorized by law of Congress;* and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges, for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the act entitled, "an act to authorize the construction of certain bridges, and to establish them as post roads," approved July 25, 1866, *so far as the same is applicable thereto: And provided, That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws*, nor to release said Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws: *Provided, also*, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars."

It will be observed that in this act reference is made to "an act to authorize the construction of certain bridges," etc., approved July 25, 1866; by the provisions of which, so far as applicable, it is provided that the Union Pacific

Railroad Company "shall be empowered, governed and limited, for the use and protection of said bridge and property."

BRIDGE ACT OF 1866.

By the act of 1866 (Stats., vol. 14, p. 244), the construction of railroad bridges across the Mississippi river is authorized, at Quincy, Burlington, Hannibal, Prairie du Chien, Keokuk, Winona, Dubuque and St. Louis, and of one across the Missouri at Kansas City. Particular provisions are made in sections 1 and 2, as to the mode of construction and use of the Quincy bridge, which, in the subsequent sections, are, by reference, made applicable to the other bridges authorized by the act. Section 1 enacts, "That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge, railway tracks for the more perfect connection of any railroads that are, or shall be, constructed to the said river, at or opposite said point, and that when constructed, all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided."

Section 2 provides for the mode of constructing the bridge and draw, if it be a draw-bridge. Section 3 provides, "That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which also no higher charge shall be made for the transmission over the same of the mails, the troops and the munitions of war, of the United States, than the rate per mile paid for their transportation over the railroad or public highways leading to the bridge."

ACT OF 1874.

By the act of June 20, 1874, entitled, "An act making additions to the 15th section of the act approved July 2, 1864" (the amendatory act of 1864, above referred to. Stats. 1873–4, p. 111), the said 15th section is amended by the addition thereto of the following:

"And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating, for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time or transportation, without any discrimination of any kind in favor of or adverse to the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000, and may be imprisoned not less than six months." Further provisions are made for suit by the party aggrieved (prescribing the courts in which suit may be brought, and the mode of service therein), "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with the requirements of this act and the acts to which this act is amendatory."

Such is the legislation governing the case. Under this authority the bridge at Omaha and the approaches thereto, on both sides of the river, have been completed by the Union Pacific Railroad Company, a railway track continuous with that of their road has been laid over them and into the city of Council Bluffs, Iowa, "transfer-grounds" (so called) have been there secured and are used in connection with such track, and the whole is owned and operated by the

Union Pacific Railroad Company. But instead of using it as a part of its line of road and as a means of "*connecting*" its road with the Iowa roads terminating at Council Bluffs (as provided for by Congress), under the unauthorized and illegitimate name of "The Omaha Bridge *Transfer*," it has undertaken to interpose the bridge and approaches as a distinct and independent line of travel and transportation *between* the Iowa roads and the Union Pacific Railroad, so as to make it not a means of *connecting* them, but a line of *transfer from* one *to* the other: just as the Iowa roads themselves are a means of "transfer" from the Illinois lines to the Union Pacific. This purpose is effected by means of distinct trains, a distinct timetable and a distinct tariff of fares and freights; $10 per car being charged on freight and 50 cents per passenger for transportation across the bridge.

The company indeed claims, both in its return and the argument of its counsel, that the transportation which it now does over the bridge is purely a matter of grace and favor; that it is not bound to operate the bridge at all, Congress having empowered it to construct it not for its own use, but merely for the use of other railroad companies who may choose to run their trains over it, paying toll therefor to the Union Pacific Co. On this view of the matter the company will doubtless act, if successful in this case: with what results to the travel and commerce of the country in case the Iowa companies shall, as at present, decline to accept the invitation to run their trains over the bridge on such terms as to toll as the U. P. Co. may choose to exact, it is not difficult to predict.

In our school-boy days the English grammar classified conjunctions as "copulative" and "disjunctive." Congress, we submit, intended the Omaha bridge to be a "copulative" conjunction. The defendants have wrongfully converted it into a "disjunctive" one, and we ask the court to correct their false grammar.

We could almost be content to submit our case upon the merits on the opinion of the learned Circuit Judge (record, pp. 45–55) without further argument. The views which support the judgment below are there presented in a form at once so concise, lucid and forcible as to leave little opportunity for counsel to add much weight to the scale.

III.

We maintain:

1st. That the legal terminus of the Union Pacific Railroad is on the Iowa side of the Missouri river.

2d. That the bridge, so far as concerns its use by the defendant, is as between the company and the public an integral part of the railroad, standing in the same relation to the road as any other bridge over which it passes in its course.

First, then, as to the interpretation of section 14 of the original act of 1862. That act having fixed the point of commencement of the northernmost branch of the road at Sioux City, Iowa, on the eastern bank of the Missouri, and of the southern branches respectively at St. Joseph, Missouri (also on the eastern side of the river), and at Kansas City, Missouri (where the river turns eastward), provides that the central branch shall begin at "a point on the western boundary of the State of Iowa, to be fixed by the President." This phrase is twice used in the section and in the course of the same sentence. After defining the point of commencement as above, it is further provided that the road is to be built therefrom "so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement *on the western boundary of the State of Iowa.*" Stress was evidently meant to be laid on this point of departure. It was not carelessly or unadvisedly designated.

By law of the United States the precise legal "Western boundary of the State of Iowa," south of Sioux City, is coincident with the middle of the main channel of the Missouri river and with the eastern boundary of the then Territory and now State of Nebraska. Congress however certainly did not mean to make this ideal geographical line, in the middle of a navigable river, the actual starting point of the railroad. By "a point on the western boundary of the State of Iowa" they meant a point on dry land, either on the Iowa shore or on the Nebraska shore of the river. *Which* did they mean?

If they meant the Nebraska shore of the river, they certainly employed a very unnatural and inappropriate phrase to express their meaning. Why in that case was there any reference to Iowa at all? "A point on the western boundary of Iowa" is a very indirect and circumlocutory way, to say the least, of describing a point on the western shore of the Missouri river, in Nebraska, opposite to Iowa. It is a phrase which no one who had the latter idea in his mind would adopt to express it. If the venue was intended to be laid in Nebraska why was not such language employed as "a point on the eastern boundary of the Territory of Nebraska," or better still, "a point on the western shore of the Missouri river, *opposite* the State of Iowa?" Why this repeated and emphasized reference to "the State of Iowa?" The learned counsel says (p. 27): "An equally pertinent inquiry would be, if the Iowa shore is meant, why is Nebraska mentioned at all?" We reply it is *not* mentioned at all, either in this or any other section of the act relative to the terminus.

The language used must receive a reasonable construction. Since in the nature of things it cannot mean a point mathematically and literally "on" the precise geographical boundary, it must mean a point on the Iowa shore, as near as is practicable to such boundary. This is in strict

accordance with common usage. The word "on," when used in designating the situation of a place, often means *near*, *at* or *by*. We say a town is situated *on* a river, lake or bay. We mean by this that it is near to or adjoining the stream or body of water. So where the boundory line between two States is coincident with the channel of a river, it is almost invariable usage to say that they are bounded by *the river*. If the question were asked, "What is the western boundary of Iowa?" the answer would be, "the Missouri river." This usage speaks of the river as an entirety, and as though it were a mathematical line. No account is made of that portion of its bed which may be within the territorial jurisdiction of the State. Treating the *river* as the boundary according to this ordinary use of terms, "a point on the western boundary of Iowa" means a point in Iowa *on* the Missouri river—*i. e.*, on the Iowa shore of the river. If Congress had meant the Nebraska shore, they would have said so.

In *Mohawk Bridge Co. vs. Utica and Schenectady R. R. Co.*, 6 Paige, 554, the words "commencing *at* or *near* the city of Schenectady and running thence on the *north* side of the Mohawk river," etc., in the charter of the railroad company, were held to authorize the company to commence their road at a point *within* the city (which was situated on the *south* side of the river and bounded by the middle of the channel), and thence to cross to the north side of the river by a bridge.

But our claim has something more substantial than mere verbal criticism to stand upon. The practical question is, did Congress intend to leave the transit of the Missouri river wholly unprovided for; or did they mean to impose the duty of providing the means of such transit upon the Union Pacific Railroad Company? We answer, clearly the latter. Congress had in contemplation a great, continuous trans-continental highway from the Atlantic to the Pacific—a national, not a local enterprise. This pro-

posed national highway is intersected at the western boundary of Iowa by a great navigable river, difficult of passage. The Iowa lines of railway, forming the next link in the chain east of the river, terminate on the eastern shore. Did Congress intend to leave here a *hiatus* in the line? It will be noticed that they were careful to provide against this and to secure close connections at the terminus of each of the other branches, at Sioux City, St. Joseph and Kansas City. Did they then mean to leave this vitally important river transit liable to fall into the control of third parties, to be managed for selfish and speculative ends, without the least regard to the public interest? Was Congress so improvident as thus to expose the trans-continental trade and travel of the country to be tolled without stint or measure, for all time, at the Missouri river? Or did they, on the other hand, intend to charge upon the Union Pacific Railroad Company, their own creature, munificently endowed out of the national treasury and the national domain with the means to discharge the national duty imposed upon it, the burden of the Missouri river transit, thus leaving no gap in the line? Can it be that a matter of such great moment, so clearly provided for in fixing the starting points of the northern and southern branches of the road, was totally neglected as respects the central and principal branch? Such improvidence ought not to be imputed to the Legislature and their action does not justify it. The terminus of the central (or Iowa) branch as well as of the northern (or Sioux City) and the southern (or St. Joseph) branches was intended to be on the eastern side of the river.

The question however is not to be determined in the light of the language of the act of 1862 alone. That act was amended by the act of 1864, the result of which is that from and after the passage of the latter act the two are to be taken together and every part of each is to be interpreted in the combined light of both.

The late Attorney General of the U. S., in his opinion furnished to the Secretary of War May 7, 1873, holding that one-half compensation for government transportation over the Omaha bridge as well as over the U. P. road west of Omaha should be applied to reimburse the U. S. for interest paid on its bonds issued to the company, clearly and forcibly states the rule thus :

" The latter act being in express terms amendatory of ihe former, both acts constitute in legal contemplation but one statute and are to be read and construed together as such—that is to say the act of 1862 should be read exactly as it would stand with all the amendments made by the act of 1864, whether consisting in the modification of former provisions or in the addition of new ones, introduced in their appropriate places in the body thereof or subjoined thereto, and should be construed precisely as if it had been originally so framed and enacted, in determining the scope and operation of the entire law and of each provision thereof subsequent to the date of the amendatory act. See *McKibben vs. Lester*, 9 Ohio St., 627 ; *Plank Road Co. vs. Alien*, 16 Barb., 17 ; *Holbrook vs. Nichol*, 36 Ill., 167."

The provisions of the 14th section of the act of 1862 as to the Iowa branch and its starting point, therefore, are to be read and explained in the light of the 9th section of the act of 1864, providing for ferries and bridges across the Missouri and other rivers ; and *vice versa*.

We have here, then, an act providing for a line of railway intended to form part of a great national line of communication between the Atlantic and Pacific coasts, which must necessarily cross the Missouri river, and requiring it to commence at " a point on the western boundary of the State of Iowa " (which boundary is the Missouri river) and to run thence westward to the Pacific coast, and further authorizing the railway company, in order " to make convenient and necessary connections with other roads, * *

* * to establish and maintain all necessary ferries upon and across *the Missouri river and other rivers which its road may pass in its course;*" also "to construct bridges over said Missouri river *and all other rivers for the convenience of said road: Provided*, that any bridge or bridges it may construct over the Missouri river *or any other navigable river on the line of said road* shall be constructed with suitable and proper draws," etc.

Taking all this together, what room is there for doubt that Congress regarded the Missouri as a river which the road must "pass in its course," because its starting point was fixed on the Iowa side; and that it therefore intended to confer *expressly* the necessary powers to bridge this river, in common with all other rivers crossing the line of the road, "for the convenience of said road." The only natural and reasonable import of the language employed is that the company is authorized to bridge any river (including the Missouri) which their road "may pass in its course," for the purpose of carrying their road over the river by the means of such bridge.

It is well said in the opinion of the court below (p. 51): "A bridge built under the authority of the act of 1862 or 1864 would be part of the road of the company, or in the language of the original charter (Sec. 14), part of its 'line of railroad constructed from a point on the western boundary of the State of Iowa.' just as a bridge in a highway has often been held to be part of the highway itself. (Dillon Munic. Corp., Sec. 579). *If there was doubt as to the right* of the company to pass beyond the middle of the river and go to the Iowa shore under the original charter of 1862, that doubt is set at rest by the aforementioned ninth section of the amended charter of 1864, which *in terms authorizes the company to construct a bridge over the Missouri river, which pre-supposes that the eastern end of it shall rest upon the Iowa shore;* and this is done, as Con-

gress declares, "to enable the Union Pacific Railroad to make convenient and necessary connections with other roads." Observe, *not* to enable the "other roads" to make connection with the Union Pacific by running *their* trains across the bridge of the latter company.

What color does the act afford for even the smallest distinction between the character and uses of the bridges authorized to be built over the Missouri, and those spanning "other rivers which the road may pass in its course?" And where is the faintest hint of any intent to clothe the company as to such river, or *any* river, with a special bridge franchise, distinct from and additional to its railroad franchise, to be enjoyed and operated as a separate thing from the railroad? Suppose the company had found it necessary in building their road to carry it over the Platte River, by means of a bridge; could they have lawfully, under this act, interposed between their lines of travel and transportation East and West of such bridge, a "Platte River Bridge Transfer" system, similar to that which has been inflicted upon the public at Omaha? It is too plain for argument that no such thing could be done. Where, then, in the law, is the authority for the "Omaha Bridge Transfer?"

Now, it is under the acts of 1862 and 1864 that the authority to build the bridge is derived, and by them its character and purposes, so far as concerns its use by the Union Pacific Railroad Company, must be determined. The subsequent act of 1871 (passed while the bridge was in process of construction), does not profess to give any new authority for, nor to change the main purposes or character of the structure. On the contrary, it recognizes these as already provided for, and gives some new facilities for raising means to complete its construction "as *now* authorized by law of Congress." And lest by possibility a different intent might be tortured out of it, it embodies the significant proviso, "that nothing in this act shall be so construed as

to *change* the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligations, as established by existing laws." More will be said hereafter about tnis act, and the extensive consequences sought to be deduced from the power to mortgage the bridge conferred thereby. At present we desire to emphasize the point, that the bridge is built under a general authority to bridge the Missouri, and all other rivers on the line of the road "for the convenience of the road," and "to enable it to make convenient and necessary connections with other roads."

The authority to bridge or ferry over rivers intersecting the line of the road as established by its charter, would pass by necessary implication without express grant.

So of the right to cross highways, or even to occupy them longitudinally with the railway track, if the road could not be otherwise constructed between the prescribed termini.

Aikin *vs.* Western R. R. Co., 20 N. Y., 370.
Mohawk Bridge Co. *vs.* U. & S. R. R. Co., 6 Paige, 554, 561.
People *vs.* R. & S. R. R. Co., 15 Wend., 113, 130.
Springfield *vs.* Connecticut River R. R. Co., 4 Cush. 63.

In the case in 15 Wend., such was held to be the law, even as to a public navigable river.

The act of 1864, therefore, really granted no powers in this respect which would not have been enjoyed under the act of 1862.

Much stress is laid by counsel for the defendant, upon the language of the *title* of the act of 1862, where the line of railroad and telegraph intended to be provided for is described as one "from the Missouri River to the Pacific Ocean;" also upon terms employed in certain sections of the act of 1864, as in section 17, authorizing a company to be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, to be designated and approved by the Pres-

ident, to construct a road from Sioux City to a point on, and to connect with, "the Iowa branch of the Union Pacific Railroad from Omaha," etc., and in section 18, where the Burlington & Missouri River Railroad Company is authorized to extend its road through Nebraska, so as to connect with the main trunk of the Union Pacific Railroad, "or that part of it which runs from Omaha to the said one hundredth meridian of West longitude." These are claimed to show an intent to fix the terminus on the West side of the river at Omaha.

The answer is, that it is not the object or intent of the clauses referred to, to fix the terminus at all, nor to designate it with particularity. The language of the title describes the road merely in a general and popular way. This is clearly seen by its reference to "the Pacific Ocean," as the Western limits of the line, while the body of the act (section 17) recognizes "the navigable waters of the Sacramento river in California," as its possible Western terminus. In the same general and popular phraseology, section 12 (page 495) provides for the construction of the roads and branches on a uniform gauge, "so that when completed cars can be run from the Missouri river to the Pacific Coast." The two great natural boundaries, the river and the ocean, to be connected by the road, are referred to without any intention of defining with precision the terminus at either end. So, also, in the clauses referred to, which speak of the branch running "from Omaha," that language is used merely for identification and description of the particular branch intended as distinguished from the Sioux City, St. Joseph & Kansas City branches. When the act of 1864 (containing these expressions) was passed, the executive orders had been made, fixing the eastern terminus at a "point on the western boundary of Iowa," opposite to Omaha, and the actual construction of the road was in fact commenced from that place. As a matter of fact, therefore, the road did run "from Omaha," just as it

might be said to run from any other place on its line, through which it had been constructed. No weight is due to these loose and unguarded expressions found here and there in the act, not employed for the purpose of fixing the precise termini, but introduced casually in sections occupied with other subjects.

Reference is also made by the counsel in the same connection to the 17th section of the act of 1862, providing for a forfeiture of the road and other property of the company to the U. S., if the roads provided for are not completed "from the Missouri River to the navigable waters of the Sacramento River in California," by July 1st, 1876. And it is asked, why, if the terminus was intended to be fixed on the Iowa side, the forfeiture was not made to attach in case of "a failure to perform the costly work of throwing a bridge across the Missouri River." This section occurs in the original act of 1862, which is entirely silent as to *bridging* the Missouri. And in the act of 1864, which first gives in terms the power to bridge, it is given in connection with the power "to establish and maintain all necessary *ferries* upon and across the Missouri River, and other rivers which its road may pass in its course." We do not say that under either of these acts the company was *bound* to bridge the Missouri, any more than it was *bound* to establish a *ferry* across it. We say that it was bound to do one or the other "for the convenience of its road," and so as to connect with the Eastern Shore and the lines of railroad there terminating; and that it having elected to *bridge* for that purpose, the bridge is a part of its road.

For another reason, we think the reference to the forfeiture clauses not a particularly happy one, for the purposes of the opposite argument. Besides that in the 17th section, referred to by the counsel, section 5 of the act of 1862 provides for a forfeiture of the road and telegraph line to the government, in case of the company's failure to redeem the bonds of the United States issued to it as pro-

vided by the act. Now can it be contended for a moment that supposing the bridge to have been built soley under the acts of 1862 and 1864, if a forfeiture had occurred under either of these sections, the company though divested of the title to, and possession of its *road* West of the river, would nevertheless have been left in the undisturbed possession and enjoyment of the *bridge*, with a franchise to toll the commerce of the country, for all time to come, at the transit of the Missouri? Was that the intention of Congress in giving them the right to bridge the river? This is a fair test to determine whether the bridge franchise is distinct from the railroad franchise. The right of mortgagees, either of the road or of the bridge, have nothing to do with it. The right of forfeiture may by the acts of 1864 and 1870, be made subject to their rights, and extend only to the interest of the company. The question is, whether, *as between the Government and the Company*, the bridge and its franchise would be exempted from the forfeiture. And we submit that clearly it would not. If not, then it is so because the bridge is a part of the road, and the company holds no separate franchise therefor.

IV.

We now pass to the consideration of the executive orders of November 17, 1863, and March 7, 1864, fixing the eastern terminus of the Iowa branch of the road. Viewing these orders even without reference to the explanatory message of the President to the Senate, of March 9th, 1864, transmitting a copy of the latter order, it is plain that if they do not conclusively settle the question in favor of the terminus on the eastern side of the river, they afford no particle of additional strength to the argument on the other side. In both orders the President carefully follows the language of the act. In the first one, he designates as the starting point, "so much of the western boundary of

the State of Iowa, as lies between the north and south bouadaries of the United States township within which the city of Omaha is situated." This allows a latitude of six miles, north and south, on "the western boundary of Iowa," the limits of which are fixed by reference to the north and south boundarics of the township including the city of Omaha. The object undoubtedly was, to enable the company to locate the precise point within these limits at such point as should be found most advantageous and convenient for the practical construction of the road and bridge.

The second order (which appears on its face to have bcen made "upon the application of said company,") fixes the point in question "on the western boundary of the state of Iowa, *east of, and opposite to*, the east line of section 10, in township 15, north of range 13, east of the sixth principal meridian, in the territory of Nebraska."

The words, "in the territory of Nebraska," evidently refer solely to the location of said section ten.

By the executive message to the Senate accompanying this last order, (record, pp. 41–2) the President first refers to the previous order of November 17, as having "fixed the point on the western boundary of the State of Iowa, from which the company should construct their branch road to the 100th degree of west longitude, and declared it to be *within the limits of the township in Iowa, opposite the town of Omaha, in Nebraska*." He then states that "since then the company has represented to me that upon actual surveys made, it has determined upon the precise point of departure of their said branch road from the Missouri river, and located the same as described in the accompanying report of the Secretary of the Interior, which point is in the limits of the order of November last; and inasmuch as that order is not of record in any of the executive departments, *and the company having desired a more definite one*, I have made the order, of which a copy is here-

with, and caused the same to be filed in the Department of the Interior."

In this message the President gives a clear and explicit construction to the order of November 17th, as fixing the point on the Iowa side of the river.

The message virtually accompanies the second order of March 7th, made at the request of the company for the purpose of fixing the starting point more definitely and precisely. In doing so, the President takes occasion to state the true meaning and intent of the former order: and as it is clear that he has no intention in the second order of *changing, or departing from*, the point he declares to have been fixed by the first order, but only means to make it more definite, the substantial effect is to incorporate the first order as thus interpreted by the executive message, into the second order, which is to be read and construed in the light of the first and of the explanation of it. And taking the whole together, it is clear that the President's intent was to fix the point in Iowa, and not in Nebraska. And, indeed, this is clear enough from the terms of the second order alone, without the messsge. Section 10, referred to therein appears by the map to be a fractional section, bounded on the east by the river. If then the "point" fixed by the order be on the Nebraska side of the river, it must be *in* section I0. But how can a point be at once *in* that section, and east of and opposite to it? The point described in the order obviously can be found nowhere except on the Iowa shore, or in the middle of the river.

Much reliance is placed by counsel for the defendant on the filing and approval of a map attached to and made part of the return, and which is claimed to show an actual location of the "initial point" of the road (*i. e.* the point to be fixed by the President, under sec. 14 of the act of 1862), in said section 10, and on the Nebraska shore of the river. (This map is not found in the printed record.

That attached to the opposite argument we presume is similar to it, but some things appearing thereon could not have been in the original, filed in 1864; for instance, the bridge.) Our answer is that it shows no such thing as is claimed. The action of the President in approving this map or location of route, filed in the Interior Department, was an entirely distinct act from his designation of the point from which the road should commence, as provided in section 14, and was done under a different provision of the act. Section 7 of the act of 1862 provides that the company "shall designate the general route of the road as near as may be, and file a map thereof in said department" (*i. e.* of the interior), "within two years:" and the map shows on its face that it was filed for that purpose. And section 14 provides in respect to the "Iowa branch," that it shall be constructed "upon the most direct and practicable route, *to be subject to his* (*i. e.* the President's) *approval.*" It was under this direction of the act that the President approved the map in question, designating the route of the road. And in so doing he gave his sanction to the point on the western shore of the river, at which the route laid down on the map begins, *not* as being the point "on the western boundary of Iowa," to be the eastern terminus of the road, but as (to use his own accurate language in his message already referred to), "the precise point of departure of their said branch road from the Missouri river:" a point by no means identical with the terminus. Since the road was to be in fact built westward from the Missouri river, a "point of departure" from the river had to be fixed on, and would necessarily be shown on a map of the route. The construction of the road was intended to be and was in fact begun on the west side of the river, and was prosecuted westward to completion, before the bridge was begun, and before its location had been fixed. The president perfectly understood what he was doing in approving this map, as clearly appears

from the terms of his message of March 9, and the apt language therein employed to distinguish between "the point on the western boundary of the state of Iowa, from which the company should construct their branch road," and "the precise point of departure of their said branch road from the Missouri river."

By his original order of Nov. 17, 1863, he had allowed the company a latitude of six miles north and south on the western boundary of Iowa, within which to locate their starting point. Subsequent to this the company determine (for reasons presently to be indicated) to fix ostensibly their "point of departure from the Missouri river" (which was to be, in fact, the "initial point" of the construction of their road, the bridge not having been built nor determined on until long afterward) at a point on the said bank in "section ten," more than a mile above the city of Omaha. They represent to the President that they have fixed on that point as such "point of departure" and request him to make a new order "more definite" than that of Nov. 17, and fixing the point of commencement of the road as provided by the 14th section of the act, so as to harmonize with their said "point of departure." And the President accordingly makes his order of March 7, fixing said point not *in* section ten, on the west shore of the river, but "on the western boundary of Iowa, *east of and opposite* to section ten." He sends a message to the Senate with this order, explaining why and at whose instance he has made it, and that it is designed to "make more definite" his original order by which he had fixed the terminus "within the limits of the *township in Iowa, opposite* the town of Omaha in Nebraska." *Then* the company file their map, designating the route of their road and making it leave the river at a point in said section ten, and the President approves it: in which there is nothing whatever inconsistent with our view of the case, nor tending to alter or modify the effect of what had previously been done.

There is another, reason, however, why the company are not in a situation to insist very much on the location of their "initial point" in "section ten." This location was merely colorable and fictitious. The track laid down from that point was never used and never intended to be. After it had served its purpose of lengthening out the first 40 miles of road (the construction of which, under the act, had to precede their receipt of the first instalment of bonds from the U. S.) so as to complete said 40 miles before entering on a more expensive part of the line, the track was taken up and all pretence of running the road to said "initial point" was abandoned. Their actual stopping place at Omaha is in the immediate vicinity of the west end of the bridge, from which their track runs continuously across the bridge into Council Bluffs. These facts are substantially conceded in the record (pp. 42-3 : record entry, foot of p. 43), and the company is and ought to be estopped by its own conduct from claiming that its terminus is in or opposite to section ten.

Yet in the face of these facts, and of the further fact appearing in the return to the writ, that the bridge in its present location was in process of construction when Congress passed the act of 1871, giving additional powers for its completion, the learned counsel argues (p. 31) that the bridge cannot be considered a part of the road, because it does not cross the river from this fabulous "initial point" in section ten ! The answer is obvious : the company cannot take advantage of its own wrong. It does not lie with it to urge that it has wrongfully located its bridge so as to reach the Iowa shore at a point somewhat different from that fixed by the President, and can therefore repudiate its duties to the public in respect to the use of the bridge. The public have no interest in locating the bridge opposite section 10 rather than in its actual location. The latter is obviously the more suitable place of the two, and Congress has impliedly sanctioned such location by the act of 1871.

See the remarks of the court below on this point (record, at foot of p. 53, *et seq.*)

We have not at hand the means of verifying all the quotations made by the learned counsel (pp. 22–27) from correspondence, official reports, etc., which are claimed to show a "contemporaneous construction" of the acts of Congress favorable to his position. Several of these (including letters from Secretaries Harlan and Usher, from Gen. Dix to the President, and extract from President Lincoln's Annual Message of Dec. 7, 1864, relate merely to the *location and approval of the route* for 100 miles west from Omaha, as shown by the map already referred to, the bearing of which on the question at issue has been already sufficiently discussed. Some of them emanate from executive officers, directors and engineers of the company itself.

There is no doubt that some of these officers have for years been doing all in their power to fix the terminus at Omaha; why, and wherefore, the court will gain some idea about, from the case of The U. P. R. R. Co., *vs.* Thos. C. Durant, in the Circuit Court for Nebraska, reported in 1 *Central Law Journal*, (St. Louis) page 581; being a suit brought to compel Mr. Durant to convey to the company lands conveyed to him in trust by citizens of Omaha, in order to induce the location of the terminus of the road at that place. The decision was against the company, on the ground that the conveyances were procured by Durant by an improper and oppressive exercise of his powers as manager of the company, and the trust was therefore held to be for the benefit of the grantees, and not of the company. Mr. Durant is one of the authorities (a truly valuable one) cited (page 24) by the counsel.

It should be noted further, that all these letters and reports were written long before the construction of the bridge, and without any reference to any question or controversy as to the location of the legal terminus of the

road. The passages quoted occur incidentally in documents relating to other subjects. The road then in fact ran from Omaha, as its "terminus" or "initial point." The question in dispute in this case never became a practical one, nor was attention specially drawn to it, until the bridge was built, and the company had adopted its extraordinary "transfer" system for its operation. Then it did at once arise, and come in a practical form to the attention of the government officers, and has ever since been the subject of controversy. It could not well be brought to judicial decision, till the passage of the act of 1873, authorizing the present proceeding. But as an offset to the selection of extra-judicial opinions cited by our opponents, we beg leave to refer to the following, looking in an opposite direction, viz:

1st. A report of Hon. J. M. Broadhead, Second Controller of the Treasury, made to the Secretary of War, May 20th, 1872, on a reference to him by the Secretary, upon the question whether one-half of the charges on government freight for transportation over the Omaha bridge should be deducted, under the 5th section of the act of July 2d, 1864, as in case of charges for transportation on the road West of Omaha. The Controller reviews at length the legislative and executive action governing the question, and concludes as follows:

"According to the ordinary and usual signification of language and within the meaning of the Statute referred to and the order of the President, the point of commencement of the road above described must be regarded as in the State of Iowa, near its Western boundary; and the bridge across the Missouri River, as a part of this road between the termini mentioned.

"I am of the opinion, therefore, that section 5 of the act of July 2d, 1864, applies to the case presented, and that one-half of the tolls due the Union Pacific Railroad Com-

pany, for use of the bridge, should be deducted and withheld in the manner provided by the Statute."

This conclusion, we believe, has ever since been acted on by the Government.

2d. A report by all the Government Directors of the U. P. Co., made to the Secretary of the Interior in pursuance of a letter of instruction from him, of February 17, 1872, upon the main question now at issue. This report also refers to the location of the point of commencement of the road by the acts of Congress, and the President's orders, and concludes that the said point is on the Eastern side of the river; refers to the provision of the act in respect to bridging the river, and concludes thus:

"We therefore find that the bridge which has been constructed by said Company *is a part of the line of said road*, bringing the same to its point of commencement as aforesaid, and perfecting its connections with the other roads having their western terminus on the western boundary of Iowa to meet on the east bank of the Missouri river. On inquiring we find that the Union Pacific Railroad Company, on or about the 6th day of January, 1872, by John Duff, its Vice-President, entered into an agreement in writing with the city of Omaha, in which it is declared that the "eastern terminus of the Union Pacific Railroad shall be and remain at said city of Omaha." This provision of said agreement, together with all others tending to change the eastern terminus of said road from the east to the west side of the Missouri river, or tending to shift the responsibility of maintaining said bridge from said Company to its connecting lines, we find to be in direct violation of its charter, and detrimental to the interests of the public."

This is signed by Messrs. Jas. F. Wilson, B. F. Wade, H. Price, John C. S. Harrison, and David S. Ruddock, Government Directors.

We believe the Company can produce no instance in which any government officer called on for any purpose to decide this question, has given an opinion in their favor.

3d. Of all persons who have been connected with the construction and operation of the Union Pacific road, from its first beginning, down to this day, no one has had a more thorough acquaintance with the whole subject, or is better qualified to speak intelligently about it than Gen. Crenville M. Dodge, ~~one of the original corporators~~, chief engineer during the whole progress of the construction, and to this day a director in the company. In his annual report as chief engineer, December 1st, 1869, (Ex. Document, No. 132, 41st Congress, Second Session), under the head of "Missouri River Bridge and Transfer," after referring to the delays and inconveniences occasioned by the mode of transferring freight and passengers across the river, then in use (the bridge not having been built) he uses the following language:

"In my opinion, the transfer can be cheapened and simplified so as to avoid the great annoyance and tax upon travel. *The Union Pacific Railroad should receive all passengers and freight on the east bank of the Missouri River*, placing the transfer in the hands of one company, and under one management.

* * * * * * * * * * * *

"*The Union Pacific Railroad, by law, has its terminus on the east bank of the Missouri River*, and its charter has been so drawn as to give it all the rights and privileges necessary to do this transfer by itself or an agent, or by contract. *No other road has any such right*, and all are subject to taxation, legislation and local restraint in any transfer that they may make. It is an unnecessary tax upon the travel and traffic of the road to force four competing roads to each put in boats to do a business that one road can do for all four. * * * * *

"The completion of the bridge at an early day is a necessity, and our experience is now such that we can push the work at almost any rate of speed directed."

It may further be observed, that in 1866 and '67, when the company was considering the subject of the location

and plan to be adopted for the bridge, three different locations were considered, viz: The "Child's Mill Crossing," some distance south of Omaha; the point where the bridge is actually built; and a point opposite "Section Ten," some distance above. Surveys were made for all of these lines, which formed the subject of a report by Gen. Dodge, as Chief Engineer, dated December 3, 1867; also of one by Jesse L. Williams, Government Director, Nov. 25th, 1867; also of one by Silas Seymour, Consulting Engineer, dated Dec. 31st, 1866. Printed copies of these several reports are now before us, with maps attached, showing the lines of survey for the road on both sides of the river for these several points of crossing; all of which lines after traversing some miles of Iowa territory converge to the same point on the Eastern side, within the limits of Council Bluffs, marked on the map, "U. P. R. R. Co.'s Grounds," and connect there with the lines of the different Iowa roads. This we think a somewhat significant indica- of the view then taken as to the power and duty of the company to extend its line of road into Iowa.

A copy of Mr. Williams' map, forming part of his report, is filed with this argument, and the attention of the court is respectfully invited thereto.

As a report from Mr. Williams to the Secretary of the Interior is cited by the counsel, (page 26) we call attention to the fact that in the same paper, and in close connection with the passage quoted by the counsel, Mr. W. says: "*The crossing of the river*, with the traffic interchanged with connecting roads from the East, is the important question here. For the present it must be by ferry, etc. * * * * "The more perfect mode of crossing by bridge, has of course been kept in view in the location." * * "I therefore entertain no doubt of the entire feasibility of bridging the Missouri for the passage of this great national thoroughfare."

So much for the topic of contemporaneous construction

V.

Constitutional Power of Congress.

It is further argued by the learned counsel that Congress has no power under the Constitution to authorize the construction of a railroad within the limits of a State. In the light of this doctrine, it is claimed, the act of Congress and all that has been done under it must be construed as rigidly excluding the Union Pacific Railroad from transgressing by one hair's breadth the geographical line limiting the sovereign jurisdiction of the State of Iowa. To the middle channel of the Missouri river it may come, but not an inch farther.

So far as this argument is intended to furnish a test of the actual intent of Congress, in respect to the location of the terminus, a moment's reflection will show that it is utterly fallacious. Leaving out of view the positive location, by this very act, of the terminus of another branch of the road at Sioux City in Iowa, an invasion of the sacred soil of a sovereign State by a railroad under federal authority is obviously no more unconstitutional than a like invasion by a bridge company under the same authority. Yet under such authority the defendant corporation (whether acting as a railroad company or as a bridge company is immaterial) has constructed its bridge at Omaha and approaches thereto on the solid ground of Iowa, and is unmercifully tolling the commerce of the country thereat.

In view of this undeniable fact, the position assumed by the learned counsel is truly remarkable. Does he mean to deny the constitutionality of the very law under which the bridge has been built, and the lawfulness of the structure itself? Apparently so, for he cites authorities (p. 18) which are claimed to negative the power of Congress to authorize the construction not of railroads only, but also of *bridges* within a State. A structure unauthorized by law across a navigable river is doubtless a public nuisance in

the eye of the law. Does the counsel mean to assert that to be the legal predicament of the Omaha bridge?

What, in this aspect of the case, is to become of the unfortunate bondholders, for whose rights the learned counsel is so solicitous in another branch of his argument? Is not a mortgage upon a structure liable to be abated as a nuisance a rather precarious security? We imagine that these mortgagees, could they peruse the argument of the learned counsel, would be constrained to exclaim in bitterness of soul:

> "*Non tali auxilio, nec defensoribus istis*
> *Tempus eget.*"

The charter of the Union Pacific Railroad is by no means the only instance tn which Congress has acted upon a widely different view of its constitutional powers from that entertained by the learned counsel. Besides the acts passed many years ago for constructing the Cumberland Road, the act incorporating the Texas Pacific Railroad Company, passed March 3, 1871 (Stats., vol. 16, p. 573) authorizes the corporation thereby created to construct and operate a railroad from Marshall, in Harrison county, Texas (near the eastern border of the State) by a route near the 32d parallel of north latitude, to a point at or near El Paso, thence through New Mexico and Arizona to a point on the Rio Colorado at or near the southeast boundary of California, and thence by the most direct and eligible route to San Diego, California. This line runs across nearly the whole State of Texas and entirely across Califoinia. The road is declared by the act to be a post and military road.

If this act be unconstitutional, upon what theory can the charter of the Union Pacific Co. be sustained? Upon what branch of the legislative power vested in Congress does the opposite counsel regard that charter as resting?

When this question was ~~put~~ seut-ti in the argument below, the answer was, the power to legislate generally for the Territories. But this view is glaringly untenable. The Union Pacific Railroad is not a territorial work. The great *na-*

tional purposes of the act are stated in its title and indelibly stamped upon every section, and have been most forcibly stated in the judgment of this court in U. S. *vs.* U. P. R. R. Co. at the present term. The charters of these national railroads must evidently rest upon some power or powers vested in Congress to legislate for the whole United States, just as completely as the charter of the United States Bank or the present national bank act.

The true doctrine we maintain to be this: that while Congress has no general and independent power to create corporations, such as is possessed by a state legislature unless specially restricted, it *has* power to create and employ a corporate body as a means for carrying into execution any power vested in it by the constitution, and for that purpose to locate such corporation anywhere within the limits of the jurisdiction of the United States, and as well in a state as in a territory or the District of Columbia. And if the creation of a railroad corporation whose sphere of operations should be limited by the bounds of a single state, could by possibility be a necessary or proper mode or means of exercising any express power of Congress, such a corporation might be constitutionally created by Congress. Can it then be maintained, that in providing for a great national trans-continental highway, for purposes of inter-state and international commerce, and as a means of conveying the government mails, troops, and munitions of war, Congress is precluded from enabling it to cross a state line, in order that it may connect with another link in the chain of communication terminating on the other side of such line? To state such a question, we submit, is sufficiently to answer it. Either the act creating the Union Pacific Railroad Company is wholly unconstitutional and void, or else Congress, having the power to create such a corporation for the ends indicated in the act, has power to authorize it to pass State boundaries when necessary for the accomplishment of those ends. We would refer on this head to the remarks of Mr. Justice Bradley, delivering the opinion of the court in R. R. Co. *vs.* Maryland, 21 Wall., p. 474.

Reference is also made by counsel to the remarks of members of Congress in the debate on the original charter, which are claimed to favor his interpretation of the act. But it is said in the opinion of this court, in U. S. *vs.* U. P. R. R. Co. already referred to, "In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

Besides, this debate occurred upon the act of 1862. Two years afterward the amendatory act was passed, in express terms conferring the power on the company to bridge the Missouri, and of necessity to pass State boundaries for that purpose. Here is no room for construction to conform to the constitutional views of our opponents.

VI.

Let us now notice *seriatim* some of the reasons urged by the learned counsel (pp. 29–34) for holding that the bridge is not a part of the railroad, but distinct therefrom, viz :

1st. (p. 30) Sec. 9 of the act of 1864, giving expressly the power to bridge the Missouri, does not empower the company to build any *railroad* additional to that authorized by the act of 1862.

What is a railroad? We suppose it will be conceded that the bridge contemplated by the act of 1864, as well across the Missouri as "other rivers which the road may pass in its course," was a structure with a railway track laid over it, continuous with the track of the road, for the passage of trains. Such is the character and *sole* function of the bridge actually constructed at Omaha.

In *Bridge Proprietors vs. Hoboken Co.*, 2 Wall., 116, it was held that such a structure was not a "bridge" within

the meaning of the charter of a company authorized many years before to construct a bridge across the river for ordinary use, with the right to take tolls, and a contract on the part of the State that it should not be lawful for any person or persons to erect "any *other* bridge over or across the river for ninety nine years."

Mr. Justice Miller, delivering the opinion, says (p. 147): "Let us see what kind of structure the defendants proposed to build. It is an extension of the iron rails, which compose the material part of their road, over the Hackensack river, together with such substructure as is necessary to keep them in place and enable them to support the cars on them. There is no planked bottom, no roadway or path—nothing on which man or beast or vehicle can pass, save as it is carried over in the cars of the defendants. Was this kind of thing in the minds of the framers of the act of 1790, or of the commissioners who let the contract? Or would the term 'bridge,' as then used by them or by common usage, have included such a thing? We have no hesitation in answering both these questions in the negative."

It appears therefore that the structure across the river at Omaha is at least as much a railroad as a bridge.

But we agree that the act of 1864 gave no power to build any *additional* railroad: for we claim under the authorities hereinbefore cited to that point, that the power to bridge for the purposes of the road, was conferred by implication by the act of 1862. What is implied in a statute is as much a part of it as what is expressed.

U. S. vs. Babbit, 1 Black, 61.

And it is bad logic to say that the former act must be held *not* to have conferred the power by implication, *because* the latter act gives it expressly.

2d. The bridge is not part of the road, because not located opposite Section Ten.

This has already been anticipated and answered.

3d. It is nowhere made *obligatory* on the company to build the bridge.

That may be. But the *power* to build it was given, and the power has been exercised, and the question now is, for what use and purpose was the power given. It is not in terms made "obligatory" on the company to build *any* bridge. The act confers the same ferry powers in respect to "other rivers on the line of the road" as at the Missouri. Are none of the bridges over which the road passes, therefore, parts of the road?

4th. Certain sections of the act of 1864, speak of the road as running "from Omaha."

This is a repetition of what has been previously urged (page 22) and has been already answered. As a matter of fact the road was built and in operation "from Omaha" to its Western terminus, long before the bridge was built.

5th. But it is upon the act of Feb. 24, 1871, that the theory of a severance of the bridge and its franchise from the railroad is mainly rested. The previous law, under which the construction of the bridge was commenced, simply authorized the company to bridge the Missouri river and all other rivers on the line of road, for the convenience of the road, and to make connections with other roads. Here is no hint of a separate bridge franchise; and it seems to us clear that the bridge in question, under that act would be just as much a part of the road, as any other bridge on its line.

The object of the act of 1871 was not in any respect to do away with or modify the character and purposes of the bridge, as previously authorized; but, 1st, to give the company power to raise means for its construction, by issuing bonds and securing them by mortgage on the bridge and approaches; 2d, to give both the company and the public,

as subsidiary to the purposes for which the bridge was originally authorized, some *additional* privileges in respect to its use.

Observe the language of the act. It does not purport to give any authority, *de novo*, to construct a bridge, for any purpose. It provides, first, that "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska," the Union Pacific Company is "authorized to issue such bonds, and secure the same by mortgage on *the bridge*, approaches and appurtenances, as it may deem needful to construct and maintain *its bridge* over said river, and the tracks and depots required to perfect the same, *as now authorized by law of Congress*."

2d. The bridge is authorized to be "so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same."

Here undoubtedly a special franchise is granted, entirely distinct from the use of the bridge for railway purposes—of which, however, the company has not chosen to avail itself, and which may, therefore, be laid out of the case.

Without this provision, it may be noted, the company would have *no right* to build anything but a *railroad* bridge, pure and simple, such as they have in fact built.

The court below has held that under this clause, coupled with the subsequent *proviso* that "Congress shall at all times have power to regulate said bridge, and the rules for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for," the company is empowered to charge special rates of toll and freight, not only upon "ordinary vehicles and travel," and for the use of the bridge by other railroad companies, under the provisions of the bridge act of 1866, incorporated into

this act by reference, but also on its own passengers and freight, transported in its own trains over the bridge. This appears to us extremely questionable, in view of the strict construction in favor of the public always to be put upon grants of franchises of this kind, as settled by the cases of Charles River Bridge *vs.* Warren Bridge, 11 Pet. 420 (544); Perrine *vs.* Ches. and Delaware Canal Co., 9 How. 172; and many other cases. But as already observed, that question is not now raised for decision, having been eliminated from the case by amendment of the writ. There is no necessary inconsistency between allowing such special charges over the bridge and requiring the company to operate it as part of their road. In fact both these things are done by the railways crossing the Mississippi by bridge.

The act further provides that: "For the use and protection of said bridge and property, the U. P. R. R. Co. shall be empowered, governed and limited by the provisions of the bridge act of July 25th, 1866," (Stats. vol. 14, p. 244,) "*so far as the same is applicable thereto.*" The act referred to authorizes the construction of bridges across the Mississippi at Quincy and several other points. The provisions thereof "applicable to" the Omaha bridge are: 1st, the right granted to all railroads constructed to the river at either end of the bridges provided for, to have their trains cross the bridge, for a reasonable compensation to its owners; 2d, that no higher charge shall be made for the transmission over such bridges of the mails, troops and munitions of war of the U. S. than the rate per mile paid for the transportation over the railroad or public highway leading to the bridge; 3d, that each of said bridges shall be a post route and a lawful structure.

These various provisions are by the act of 1871 superadded or engrafted upon the uses and purposes for which the Omaha bridge was originally authorized; and there is nothing whatever in them inconsistent with those original

purposes, nor with the obligation of the company to operate the bridge as part of their road.

The learned counsel, we conceive, is altogether wrong in saying (p. 30) that "To hold it as part of the road, withdraws it from the operation of this act," (*i. e.* of 1866) "subjects it to the private use of the company, *excludes the trains and cars of other roads therefrom*, gives it the power to destroy the better connections it was created to preserve, and inflicts upon all other railroad companies and their business the *hiatus* referred to by the court below."

How and why do any such consequences result? Why does holding the U. P. R. R. Co. to be under *obligation* to run its trains over this bridge like any other piece of its road, deprive the other companies whose lines con erge at Council Bluffs and Omaha of the *privilege* of crossing the bridge for reasonable compensation? Nothing is more common in railway operation, both in England and this country, than for one company to be vested either by statute or contract with "running powers," as they are called, over some portion of the line of another company. This does not in any way alter the relation of the latter company to its road, nor its obligations in respect to its operation. Each of the four or five State railroads converging at either end of the bridge is by the act enabled to connect with any or either of those on the opposite side by means of this bridge, *if they choose so to do*. They are not *bound* to do so; and Congress did not mean to leave it at the option either of the Iowa companies or the Union Pacific whether the close connection between them, for which the bridge was first authorized, and which is so essential to a great continuous highway across the continent, should be effected or not. The necessary result of the opposite argument is that the plain intent of Congress in regard to this connection may be defeated at any time by the obstinacy, caprice or disagreement of the railroad companies.

6th. We will now consider the influence on this case of the power to mortgage the bridge, conferred by the act of 1871. A strenuous effort is made by defendant to shelter itself under the wing of its mortgagees, and it seems to be supposed that the court is called on to determine in this case the extent and priority of the lien of the bridge-mortgage, and all the rights of the bondholders secured thereby. But is this so? The only party defendant, whose action is sought to be controlled by the writ asked for, is the Union Pacific Railroad Company, the mortgagor, which is in full possession of the bridge and road, operating both as its own property. No judgment to be rendered in this cause can possibly affect the mortgagees. We seek to compel the Union Pacific Company, while it continues to own and operate the road and bridge, to operate them in a certain way. Can it affect our claim to this relief, that there is a mortgage on the property, which may by possibility some day be foreclosed, and result in divesting the defendant of its title and possession? If that should happen, then undoubtedly the mandate of the writ would cease to be operative as against the present defendant, and it is equally clear that it would not attach upon the new proprietors. Any question as to *their* rights and duties in the use of the property, after it shall have been severed by foreclosure and sale from the residue of the company's line, will have to be determined in a proceeding to which they shall be parties. "Sufficient unto the day is the evil thereof." We are now dealing with the rights and duties to the public, of the Union Pacific Company, in full possession and enjoyment of the bridge as its owner. As remarked in the opinion of the court, below (page 54). "It were premature at this time to anticipate that there will be a sale under the bridge mortgage, and to consider the rights of the purchaser, of the company, of the public, or of the Government after that event."

It will be time enough to discuss the rights of the mort-

gagees when, the company failing to pay interest or principal of the mortgage debt, it shall become necessary to enforce those rights. We are not asking for a writ which shall compel the Union Pacific Company to operate the road and bridge as a continuous line for all time to come; but only while they continue to own and possess them.

The act of 1871 simply authorizes the company to issue bonds to a certain amount, and secure them by mortgage on the bridge and approaches, in order to construct the same "as now authorized by law of Congress." This doubtless authorizes a mortgage on the bridge and approaches, by themselves, the foreclosure of which might effect a severance of the bridge from the rest of the line, as already indicated. But it does not at all follow that the mere execution of the mortgage effects such a severance *in presenti* in respect to the use and enjoyment of the property while in the hands of the mortgagor. In what respect does it differ from the case of several mortgages by a railroad company of its line by sections; a thing not at all uncommon? Such mortgages, before foreclosure, do not affect the entirety of the property, nor its use as one continuous line, by the company owning and mortgaging it. But in case of foreclosure, a division may be effected. This has recently happened to the Des Moines Valley Railroad, in Iowa, formerly an entire road from Keokuk to Fort Dodge, but which, having been mortgaged in two separate divisions, has by foreclosure and sale been severed into two roads, owned by different companies. But could the mere existence of the mortgages on its two divisions respectively, have been set up by the company as a valid reason for operating the divisions as distinct lines? Do such mortgages operate from their date as a virtual severance of the company executing them into *two* railroad companies? If not, neither does the power to mortgage the Omaha bridge, as soon as executed, divide the Union Pacific Railroad Company into a railroad company and a

bridge company. That power, given as it is by an act posterior to that which authorized the bridge, cannot affect the entirety of the road or franchise, except so far as necessary to the security of the mortgagees. The mortgage before foreclosure is merely a lien, and the obligations of the mortgagor to the public are not affected by the mere existence of that lien unenforced.

In The Medical College of Ohio *vs.* Ziegler, 17 Ohio St. 52, a statute authorizing the college trustees to mortgage its real property to raise money to erect a college building thereon, contained a proviso (among others) that the mortgaged property should forever be occupied for a medical college, as provided by the charter.

It was held that the proviso must be construed to limit the uses of the property only while owned and held by the college, and not after foreclosure and sale under the mortgage. The principle of this decision will enable the courts, if occasion shall ever arise for it in the future, to protect the rights of parties claiming under this bridge mortgage, without in the meantime discharging the U. P. Co. from its obligations to the public.

It is said by the counsel (p. 30) that "the construction of railroad bridges has almost uniformly been undertaken by *bridge companies* deriving their corporate powers from State legislation," and that such companies are not required to run trains over their bridges. In view of this fact, it is significant of the intention of Congress in regard to *this* bridge that it neither created nor authorized any "bridge company" for its construction. The bonds and mortgage on the bridge are the obligations of the Union Pacific Railroad Co., payable like any other debt, out of its general treasury. The recourse of the bondholders is not limited to the bridge or its revenues.

The act of 1871, while conferring the power to mortgage, is silent as to the relative priority of the lien of such mort-

gage, and makes no special provisions whatever as to the rights and powers which may be vested in the mortgagees. Nor is the court now called upon to decide any such questions. The grant of the power to mortgage in connection with the *purposes* for which it is made, viz : as a means for constructing the bridge, might well be held to be by implication a postponement in favor of the mortgagees of the government's lien on the road for payment of its bonds, to that of the mortgage, as it was expressly postponed by section 10 of the act of 1864 to the mortgage on the whole road.

Whether the company's mortgage on their road covers the bridge or not is a question depending largely upon the terms of the instrument, and one which we do not think it necessary to argue. The bridge was not in existence when that mortgage was made, and the company was probably then under no absolute obligation to construct it. One thing is clear, viz : that neither the act of 1871 nor anything done under it can have any influence on the determination of this question. The rights conveyed by the mortgage on the road, whatever they were, were fixed and vested before that act was passed. Congress could not divest them nor empower the company to do so by a mere authority to mortgage the bridge. Nor can it possibly be claimed that the act of 1871 can, as to prior mortgagees, have any influence on the interpretation to be put on the acts of 1862 and 1864, as to the character and purposes of the bridge thereby authorized. But it is not worth while to occupy ourselves with questions which do not now arise. The question *now* is whether this bridge and the railway track over it are held and must be operated by the Union Pacific Company as part of "one continuous line" with the remainder of its road. The statement of counsel (p. 34) that "the decision of the court below *has been accepted by the public as a repudiation*" of the bonds secured by the bridge mortgage, is, we think, entirely unwarranted. Allusion is per-

haps made to the somewhat limited and partial "public" of Omaha; and "repudiation" is probably thought to be a potent word to conjure with, in this court.

Finally, on this head, we call attention again to the explicit proviso in the act of 1871, "That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company or its successors, from its obligations as established by existing laws."

This clause of itself not only defeats any argument on the other side, based on the act of 1871, but points unmistakably to a location of the terminus "under existing laws" on the eastern side of the river. Why, otherwise, should such a proviso have been inserted? There was no need of it to prevent the act from being construed to change the terminus from the western to the eastern side of the river; for there is nothing in it which could possibly have *that* effect. The construction intended to be guarded against, it is clear from the latter clause of the proviso, was one which might have the effect to *release* the company "from its obligations as established by existing laws:" *i. e.*, a construction in favor of the company, not of the public. But to remove the terminus from the western to the eastern side, would impose new obligations on the company, rather than release them from old ones. Nor can it reasonably be held to import a prohibition of a removal of the terminus from the ideal point opposite Section Ten, some ten miles above Omaha, while sanctioning the location of the bridge at a different point; for neither the public nor the government had the smallest interest in adhering to that precise location which the company had abandoned, but quite the contrary. The proviso is therefore meaningless and nugatory, unless it imports the intention of Congress to keep the terminus on the *eastern* side, as "fixed under existing laws."

VII.

It is contended by defendant's counsel that even though we are right in our position that the legal terminus of the road is on the Iowa side of the river, and that the track over the bridge is a part of the road proper, yet the company is not bound to operate it in accordance with the mandate of the writ. It is said that operating the road "as one continuous line," does not require the running of trains through to the terminus, nor starting them from the terminus.

Let it be observed here, that although we rely strongly on the provision of the act requiring the whole road to be operated, "for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line," (act of 1864, section 15), we are not obliged to rely on that provision exclusively. There is nothing in the terms of our writ which *confines* us to a reliance on that section, as suggested by the learned counsel, although reference is made to it, and the course hitherto pursued by the company is claimed to be in violation thereof. The act conferring jurisdiction in this case grants the remedy by mandamus to compel the company "to operate its road *as required by law*." Now, if a particular point is made by law the *legal* terminus of the road, the company is "required by law" to make it the actual and practical terminus, and an express enactment is not needed to impose that duty. The company now claim that their legal terminus is at Omaha, and they operate the road so as to make it their actual terminus. The substance of the argument now under review is, that though the court should hold the legal terminus to be at Council Bluffs, the company may still continue to make Omaha the actual terminus. According to this view, a "terminus" is a mere legal abstraction—*vox et praeterea nihil*. It is in strict harmony with this idea, that counsel

contend that the legal terminus is at a point on the west bank of the river, two miles above the bridge, to which the company has no track, and no intention of constructing any.

The decision in *The State vs. Hartford & New Haven R. R. Co.*, 29 Conn., 548, is directly opposed to these views. There the railroad company was chartered to construct a road from Hartford to a point on the navigable waters of New Haven Bay. Having built and operated their road between the prescribed termini for a series of years, they at length discontinued running their *passenger* trains to the terminus on the bay (where they connected with steamers to New York), having made a contract with the New York and New Haven Railroad Company to run them instead to the station of the latter company in the city of New Haven, at a distance of a mile or two from the bay terminus, there to connect with the trains of the latter company. A mandamus was granted to compel the company to resume running their trains to the terminus on the bay; and the contract with the other company, not to do so, was adjudged to be void.

A similar decision was made in *Rex vs. Severn & Wye Railway Co.*, 2 B. & Ald., 646, where the company had taken up a portion of their track, and were compelled by mandamus to lay it down and operate it again.

It is no answer to this, to say that the company do haul passenger and freight cars to and fro across the bridge, between Council Bluffs and Omaha. They do not run their *railway trains*, of either kind, east of the depots at Omaha. The bridge and approaches are used merely for the purposes of "transfer" to and from these depots to the other side of the river, and this is done, as the company claim, as a matter of favor to the public, and not of duty. The company, therefore, does not *pretend* to be operating the bridge as part of its road, nor as "one continuous line" therewith. The bridge and approaches are not used for the purpose for which they were authorized

to be constructed, viz: to enable the Union Pacific Railroad to *connect* with the Iowa roads. As now operated no such connection is made. It is the "Omaha Bridge Transfer" line which "connects" at one end with the Iowa railroads and at the other with the Union Pacific Railroad. There can be no "connection" such as Congress contemplated, unless either the Union Pacific road or the Iowa roads cross the bridge with their trains. The Iowa roads do not cross, and cannot be required to do so, Council Bluffs being their legal terminus. As already observed, Congress did not mean to leave this important connection to be made or not, at the option of either road. The act of 1864 authorizes the U. P. Co. to bridge the Missouri to enable *that company* "to make convenient and necessary connections with other roads," not to enable the other roads to make such connections, if they see fit.

But Congress has not left this matter in doubt, for want of an explicit enactment. It has enacted, first, in section 12 of the act of 1862 (page 495), "The whole line of said railroad and branches and telegraph shall be operated and used, for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous, connected line." And again, in section 15 of the act of 1864, (p. 362), "That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph, for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; *and*, in such operation and use, to afford and secure to each equal advantages as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others." And again, by the act of 1874, amending the last mentioned section, *each* company is made liable to action for treble

damages, and its officers to fine or imprisonment, for failure to operate *its own* road "as one continuous line," etc., as required by the section.

Let it be observed that these explicit and repeated provisions have reference to the "operation and use" of the line, not merely to its mode of construction. It is not enough that there is a "connected and continuous" line of track laid—it must be *used* and *operated* continuously. To what purpose have the track continuous (*i. e.*, without break or hiatus), except that trains may run through continuously from end to end?

But what throws the clearest light upon the meaning of this continuous operation and use, is the clause preceding the one just cited, in section 12 of the act of 1862: "The track upon the railroad and branches shall be of uniform width, to be determined by the President of the United States, so that when completed, cars can be run from the Missouri river to the Pacific coast." Will the defendants claim that this does not apply to the bridge, and that the company could have rightfully laid their track thereon of a different gauge from that of the road; or that they could have constructed the bridge without any railway track, and made the transfer across it by ordinary horse-power? If not, whence do they derive their authority for making a break in the continuous running of their trains at Omaha, thereby rendering the continuous and uniform line of track over the bridge to a great extent nugatory? If they can do this between Omaha and Council Bluffs, they can equally do it over any other piece of their line, between its extreme termini.

It is contended that the requirement of a continuous mode of operation and use refers only to such use as between different companies (*e. g.*, the Union Pacific and the Central Pacific), whose roads respectively form parts of the entire line. But to what purpose such a requirement, if

each company is at liberty to break up its own line into different divisions and operate them separately? The greater includes the less, and the whole includes all its parts. Moreover, the recent act of 1874 expressly makes the officers of any one of the companies criminally responsible for failure to operate its road as one continuous line. This act does not purport to impose any new duty, but only to give additional sanctions to those already existing.

But it is urged that considerations of convenience or safety may require on a long line of railway a change of cars at an intermediate point on the route; and it appears to be assumed that our views of the law, if not our writ in this case, would forbid this and require the same identical vehicles to be run through without change, from end to end of the route.

As matter of fact, everybody knows that the U. P. Co. regularly runs the same identical passenger cars through from Omaha to its junction with the Central Pacific; that it is nothing unusual for special cars to make the entire trip through to California; and that cars loaded with through freight are constantly run through without trans shipment from the Atlantic coast to the Pacific.

But it is *continuity of trains* rather than identity of cars from end to end of the line for which we contend. There may be a continuous train, although changes may occur in the particular vehicles constituting the train: just as the identity of the human body is preserved though the particles of matter composing it are subject to continual waste and renewal.

Our writ gives no directions as to how far westward the identical cars starting from the eastern terminus must proceed. It only requires that the *through railway trains* of the company—such trains as *they actually now* run from and to Omaha—shall start from and run to Council Bluffs.

What we complatn of is, that the company has fixed its actual railway terminus at a point about two miles west of its *legal* terminus : and that it operates this fraction of two miles as a distinct, non-continuous line. The ' transfer" device of the company, under which the bridge is operated, is set forth in the record, at page 4. and exhibits (pp. 5–9) and is so vexatious and unreasonable, and so contrary to the usual mode of operating railways (supposing the bridge to be part of the railway) as to show on the face of it that it is not adopted in good faith for any of the prudential reasons suggested by counsel, nor for any legitimate reason. The return does not undertake to show any necessity for it. The motives inducing it are not difficult of discovery. The company desires to coerce the Iowa roads into crossing the bridge and making the connection at Omaha, thereby enabling it to escape the burden of operating the bridge at all ; and it has made an illegal contract with the city of Omaha (referred to in the report of the government directors hereinbefore mentioned) binding itself, in consideration of a bribe, to fix and keep its terminus at Omaha, make up all its trains there and there. receive from and deliver to other roads from the east, freight and passengers.

Gass *vs.* R. R. Co., 99 Mass., 226, cited by the counsel, decides nothing as to what constitutes operating a railroad as a continuous line. The only question was whether a railroad company whose trains connected with a line of steamboats, forming as the case states " a continuous line of transportation," was liable as a *partner* for the loss of merchandise shipped for transportation through, which was destroyed by fire before being landed from the boat. And it was held not liable.

It is suggested that if the trains are to be run to and started from the eastern side of the river, the rolling stock will be exposed to be cut off from the road by accident to the bridge. Did it occur to the learned counsel that the

four Iowa companies might equally urge this objection against the plan of operations he insists on as the proper one, viz : that those companies shall run their trains to Omaha ? But in fact the difficulty is imaginary.

No one asks that the company be required to keep all their rolling stock at Council Bluffs and none at Omaha. They may keep their shops and principal depots of cars and engines at Omaha, and yet fully comply with the writ. If for convenience they should find it necessary to keep a portion of their equipage on each side of the river, it would be no great hardship. The fact is we believe they do so now. And at any rate they must do what is necessary to enable them to comply with the law. The argument from inconvenience is of but little weight except in a case of great doubt. The company having accepted their charter, with all its advantages and privileges, including a munificent endowment by the government, must take it also *cum onere*. It was not for nothing that this bounty was bestowed.

The learned counsel concludes his elaborate and ingenious argument by an appeal *in invidiam*. He represents this controversy as a mere neighborhood quarrel between rival towns. He cannot, however, succeed in dwarfing it to these proportions Whatever degree of interest may be felt by the citizens of these towns, beyond that of the general public, it is obvious that the questions at issue affect in a greater or less degree, every traveller and shipper upon this great national thoroughfare, including the government of the U. S., and that they are of the deepest interest to all the railway companies forming links in the chain of communication east of the Missouri. Great complaint is made by the counsel of the action of the Iowa companies, and of "unconstitutional" Iowa legislation. The companies have simply stood upon their rights, not choosing to be coerced into assuming a burden which properly

rests upon the Union Pacific Co. As to the Iowa statute enjoining this course upon them, we understand that a majority of the Supreme Court of the State have lately held it to be in conflict with the acts of Congress relative to inter-state communication; and that the cause is still pending on application for a re-hearing. But whether that act be valid or not, no one claims that under any law, state or federal, the Iowa roads are *bound* to cross the bridge. The substantial question in this case is, does that obligation rest on the Union Pacific Company? If this court shall hold that it does not, the "transfer" now carried on by that company *ex gratia*, will, it is to be presumed, speedily come to an end: and the prevention of a total break and chasm in the line will then depend on the consent of state corporations to cast themselves into the breach. Whether they would probably do so or not, is not a matter to be considered. We say emphatically, that Congress, in providing for this bridge, has not left its usefulness subject to any such contingency.

Before concluding this argument (which has, to our regret, much exceeded its anticipated length) we wish to refer to another cause now pending in this court and supposed to involve the same questions with the present case, viz: No. 868, Comrs. of Douglas Co., Appts., *vs.* The U. P. R. R. Co., an appeal from the Circuit Court for Nebraska. This is a suit by the R. R. Co. to enjoin the collection of a tax levied under the laws of Nebraska, upon the Omaha bridge, on the ground that the bridge, being a part of the U. P. Railroad, is not taxable separately. The suit was commenced after decision of this case below, and the decree appealed from has been rendered since the present term of this court began. It has been rushed with true *railroad* speed into this court, and at the time of this writing a motion has already been submitted to advance it for argument.

We should have been glad to have been advised of the

intention to bring on that case with such expedition before we agreed to submit this cause in print. It will be observed that the R. R. Co. occupies the same position in the tax case, on the record, which we occupy and it *controverts* in *this* case. We do not know whether that cause is to be argued on behalf of the R. R. Co., but we cannot suppose that its counsel intend to put themselves before the court at the same time, advocating diametrically opposite conclusions in two cases, for the same client. Having had occasion on the argument of this cause below, to appreciate the learning and ability of the counsel for the appellant in the other cause, we should deprecate having an argument from him against our position in this case pass without reply. Possibly this cannot now be helped, as the submission of this cause under the 20th rule cannot be delayed. But we may ask the court to grant us a hearing in reply, if any way consistent with its rules of practice.

[redacted]

VIII.

In addition to the foregoing argument on the merits of the cause, we feel it our duty to call attention to a further question, viz :

Has this court jurisdiction of the case?

The act of 1873, granting this remedy in the Circuit Court, being silent as to any writ of error thereon, the only enactment which can be claimed to authorize it is sec. 691, U. S. Rev. Stats. (re-enacting sec. 22 of the judiciary act of 1789, 1 stats. p. 83, as modified by sec. 2 of act of March 3, 1803, 2 stats., 244) which provides that "All final judgments of any circuit court, or of any district court acting as a circuit court, in *civil actions* brought there by original process, or removed there from courts of the several States, and all final judgments of any circuit court in civil actions removed there from any district court by appeal or writ of error, where the *matter in dispute*, exclusive of costs, *exceeds the sum or value* of two" (now *five*) "thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court, upon a writ of error."

This section we submit is not applicable to this case for the following reasons :

1st. This *original* mandamus proceeding, under the special jurisdiction conferred as above, is not a "*civil action*" within the meaning of the section. Mandamus is a special and extraordinary remedy, not demandable as if right—anciently a branch of the royal prerogative, and issuing out of no English common law court except the King's Bench. And it has been many times held that to entitle a party to a mandamus, he must show that he has *no adequate remedy by action.*

People vs. Supervisors, 11 N. Y., 563.
People vs. The Mayor, 25 Wend., 680.
Ex parte Fireman's Ins. Co., 6 Hill, 243.
People vs. Lawrence, *id.* 244.

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People vs. The Mayor, 25 Wend., 680.
Ex parte Fireman's Ins. Co., 6 Hill, 243.
People vs. Lawrence, *id.* 244.

That an original proceeding by mandamus could not have been intended to be embraced in the term "civil action" in this act is also evident from the fact that, as held by this court, no original jurisdiction of such a proceeding was conferred on the circuit or district courts by the judiciary act; and clearly such a proceeding could not be removed from a State Court into the Circuit Court. In Bath County *vs.* Amy, 13 Wall., 244, it was held that the 11th section of the Judiciary Act, providing that "the Circuit Court shall have original cognizance concurrent with the courts of the several States, of all *suits of a civil nature at common law* between a citizen of the State where the suit is brought and a citizen of another State" does not confer any jurisdiction in mandamus.

The language of the opinion of the court, delivered by Mr. Justice Strong (p. 248), is directly in point in our favor, and the court is respectfully referred to what is there said.

Since then Congress did not, by investing the Circuit Court with original jurisdiction "of all suits of a civil nature at common law" between citizens of different States, confer the power to entertain an original proceeding in mandamus, how can such a proceeding be held to be embraced in the more precise and definite language "all *civil actions*," employed in that section of the *same act*, providing for writs of error on judgments of the Circuit Court? And if not within the purview of that section at the time of its enactment, how can it be brought within it by a subsequent act, clothing the Circuit Court specially with original jurisdiction in mandamus only over a particular party, and as to a single subject matter, without a word as to any review of its decision by this court?

This argument does not militate against the jurisdiction so often exercised by this court to review on error proceedings by mandamus in the Circuit Courts, to compel payment of judgments therein rendered against municipal corporations. Such proceedings are not *original*. They are founded on and are auxiliary to judgments in civil

actions, and amount simply to an award of the proper writ of execution on such judgment.

(Riggs *vs.* Johnson Co., 6 Wall., 166 : Comrs. of Knox Co. *vs.* Aspinwall, 24 How., 384).

Columbia Ins. Co. *vs.* Wheelright, 7 Wheat., 584, is not in point, being on error to the Circuit Court of the District of Columbia, which had a general jurisdiction in mandamus (Kendall *vs.* U. S., 12 Pet. 524), and from which error or appeal lay to this court on "any final judgment, order or decree, etc." (2 Stats., p. 105. sec. 8).

2d. But a still more formidable objection to this writ of error is found in the condition imposed, that "the matter in dispute shall exceed the sum or value of $5000."

The meaning and effect of this restriction have been considered and settled in several cases in this court.

Ritchie vs. Mauro, 2 Pet., 243.
Barry vs. Marcein, 5 How., 103.
U. S. *ex rel* Crawford vs. Addison, 22 How., 174.
Pratt vs. Fitzhugh, 1 Black, 271.
De Krafft vs. Barney, 2 Black, 704.

In Barry *vs.* Mercein, 5 How., 103 (the leading case, ever since followed), the rule is laid down thus by Taney, C. J., p. 120 :

"In order therefore to give us appellate power under this section, *the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained.*" * * * * * * * *

"The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated in the ordinary mode of a business transaction."

Now what is the nature of this case and what is the "matter in dispute" therein? The proceeding is by the United States against the R. R. Co. to compel it to perform continuously a duty which it is alleged to owe to the pub-

lic, under its charter, in respect to the mode of operating its road. Whether or not the company owes this duty to the public is the "matter in dispute."

The right or duty sought to be enforced, is one of a *public* nature. It might have been enforced by a proceeding by the government, through its law-officers, without the intervention of any private person. (The State *vs.* R. R. Co. 29 Conn., 538.) And though in this case the proceeding has been set on foot by private citizens, as relators, it is not for the purpose of vindicating any right peculiar to them.

Now this "matter in dispute" between the public and the Railroad Co., viz: whether or not the company is bound under its charter, for the convience of the public, to run its through trains over the bridge to and from Council Bluffs, (instead of stopping them at, and starting them from Omaha), is a matter not capable of being valued at any definite and ascertainable sum of money. By no possibility can it be made to satisfy the conditions of the rule laid down by Taney, C. J., in Barry *vs.* Mercein, 5 How., 103, quoted *supra*. It is not a controversy about a right of property at all, nor about any right to which a property or pecuniary right is appurtenant. The right in question is simply one affecting the public convenience, upon which no price can be set.

Counsel for the plaintiff in error, seeing this difficulty, have attempted to help out their case by filing affidavits in the court below, (after judgment) by which it is sought to be shown that compliance with the mandate of the writ as ordered will subject the company to great expense over and above what it costs them to operate the road as heretofore. (See record, pp. 57–60.) This additional expense, it is claimed, will consist in the cost of running the trains between Omaha and Council Bluffs, and in the erection and maintenance of buildings on the Iowa side, which will be required by the change in the mode of operation.

These affidavits, it is submitted, help the case in no degree.

1. In the first place, it is evident that whether the change in the mode of operation required by the writ will entail additional expense upon the company, and if so, to what extent, is a matter of mere conjecture, and dependent largely upon the volition or preference of the company. Why must it cost the company $50,000, or one dollar, more per annum to run their regular through freight and passenger trains over the bridge than to run separate "transfer" trains as heretofore, doing the same transportation in either case? As to the alleged necessity for new buildings, shops, etc., this is obviously a matter of choice and convenience on the part of the company. What difference can it *necessarily* make in the appliances required at Council Bluffs, whether freight and passengers are there trans-shipped to and from local (or "transfer") trains of the defendant, or to and from its through trains? It is evident that the affiants have largely assumed the mantle of prophecy, and that there is an utter absence of that "known and certain value, capable of being proved and calculated in the ordinary mode of a business transaction," held in Barry *vs.* Mercein to be necessary to satisfy the statute. And there is no reported case sanctioning proof of the amount in controversy by affidavit, to sustain the jurisdiction of this court, except as to the value of specific property.

2. But even if it appeared with all due certainty that this alleged additional expense would be the necessary consequence of compliance with the mandate, still we insist that the amount of such expense in no legal sense constitutes "the value of the *matter* in *dispute*."

"The matter in dispute" is not whether the company shall be charged with these expenses. *That* is a matter collateral to, and consequent upon, the decision of the "matter in dispute," but affecting only *one* party to the controversy, viz: the Railroad Company. It is a matter of no interest whatever to the public, or to the government, whether the company is burdened with additional expense, or whether, on the other hand, it is a pecuniary gainer by the change in the mode of operation required by the writ.

In either case, such change will be of the same "value" to the public, but that "value," as already shown, is incapable of reduction to a definite pecuniary standard. Hence, it is perfectly clear that *had the Circuit Court refused the mandamus, neither the Government nor the relators could have brought error upon the judgment.* This, we submit, furnishes a crucial test, whether the consequential expense of obedience to the company, is the "value of the matter in dispute." This "value" must be something inherent in the controversy, which concerns *both parties:* as, for instance, in the contest for the mayoralty of Georgetown, (U. S. *vs.* Addison, 22 How., 174), where the salary belonged to the successful contestant, whichsoever he might be. But where, as in this case, the "matter in dispute" is a public right or duty, in itself incapable of pecuniary valuation, so that the parties maintaining the right, if they fail, can have no review in this court, the mere fact that the performance of such a duty will entail expense on the party adjudged liable to it, (the public having no interest in such expense), surely cannot entitle that party to a writ of error.

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